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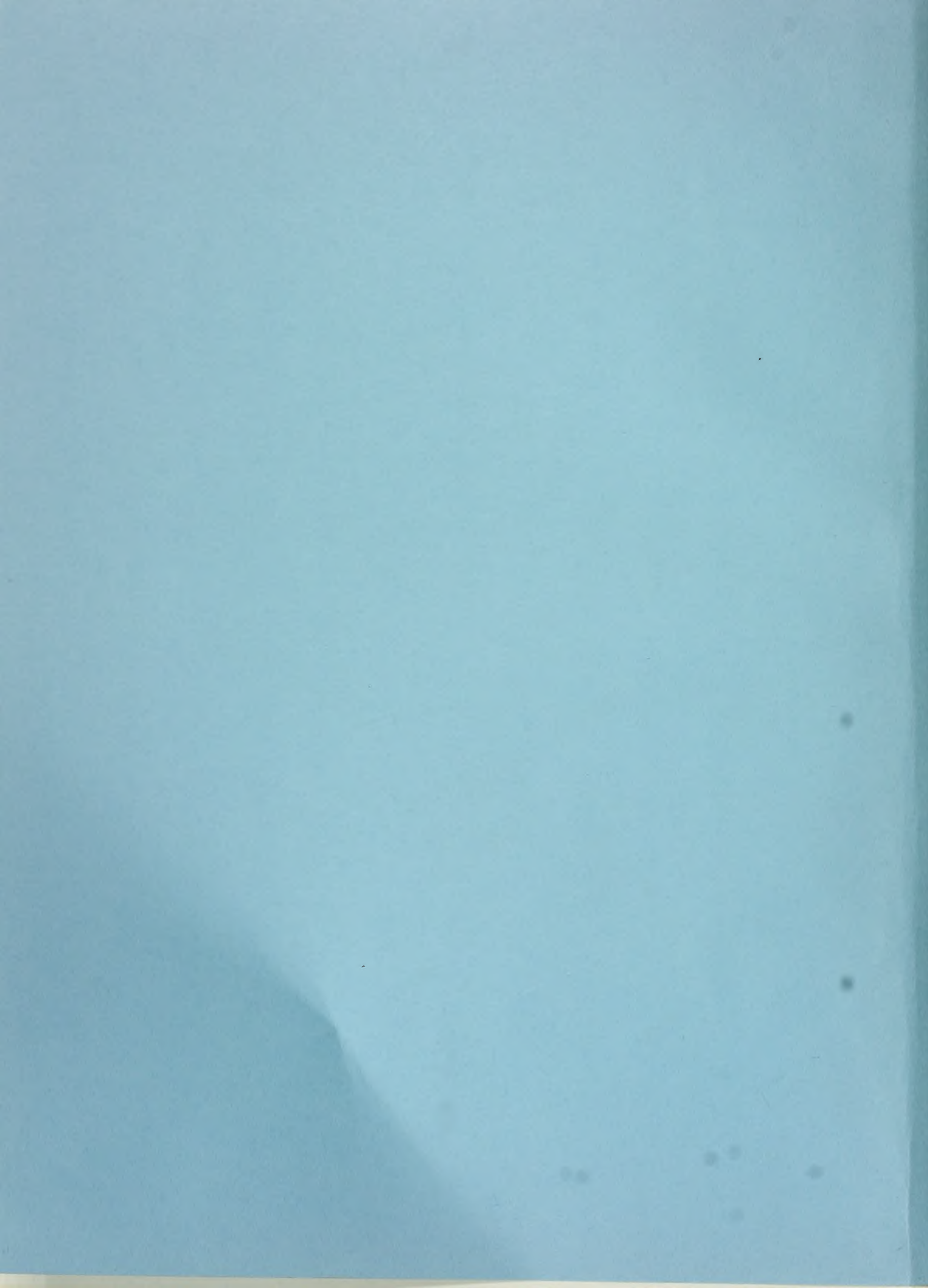
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT E. NEAGLE and NORMA C. NAEGLE,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
Assistant Attorney General.

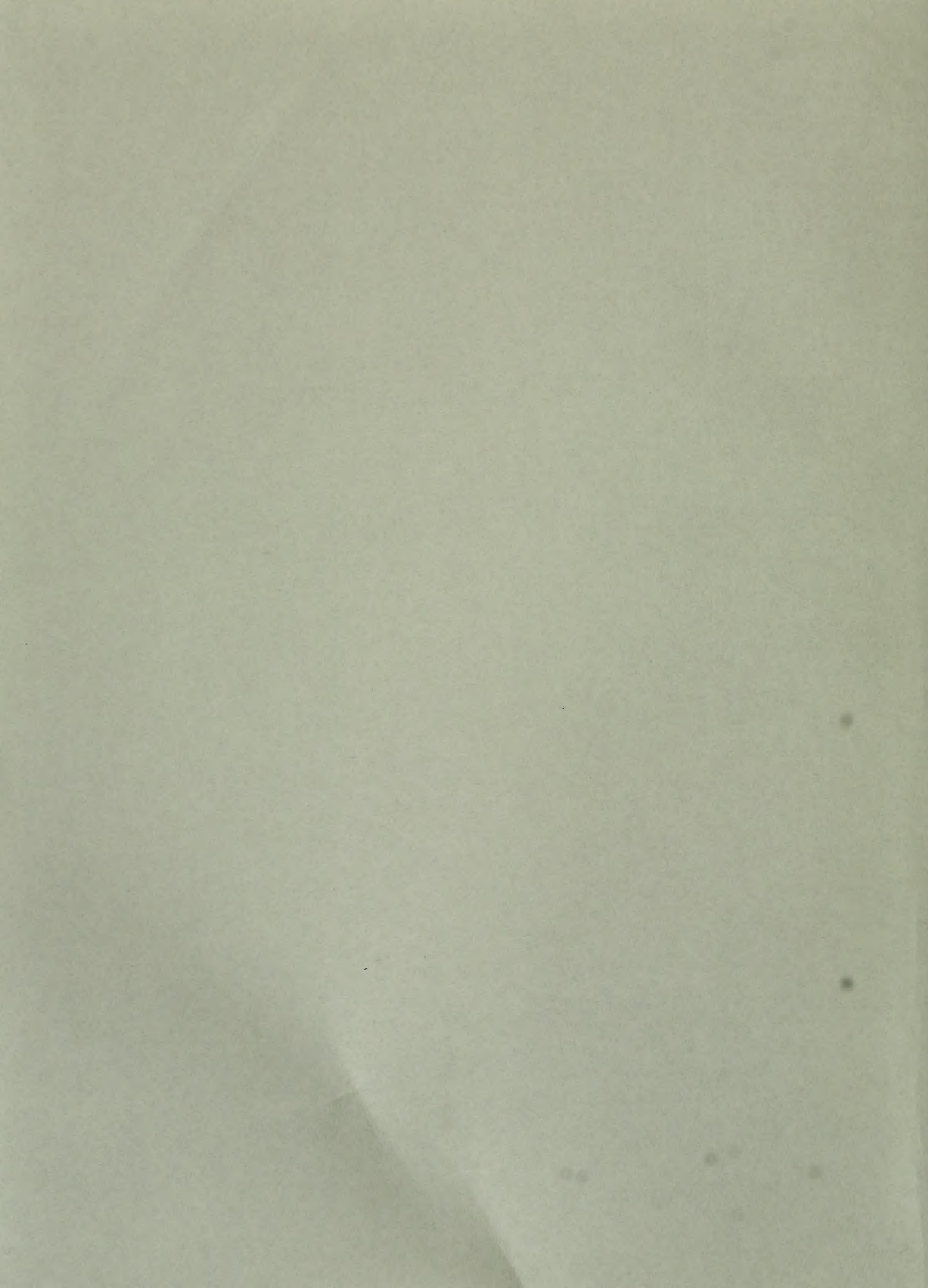
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IN THE UNITED STATES COURT OF APPEALS
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Nos. 20877 and 20877A

GRANT E. NAEGLE and NORMA C. NAEGLE,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court
(I.R. 54-62) are not officially reported.

JURISDICTION

The petitions for review (I.R. 88-103) in this case involve
deficiencies in income tax in the total amount of \$16,718.57 against
Grant E. Naegle for the years 1956 and 1960 and in the total amount
of \$249.11 against his wife, Norma, for the years 1959 and 1960.
On March 18, 1963, the Commissioner of Internal Revenue mailed
notices of the above deficiencies to the taxpayers. (I.R. 11-17, 31-35.)
Taxpayers filed timely petitions with the Tax Court for a redetermination
of those deficiencies under Section 6213 of the Internal Revenue Code
of 1954. (I.R. 1-17, 27-35.) The decisions of the Tax Court were

entered on November 10, 1965 (I-R. 80-81, 86-87). Taxpayers petitioned for review by this Court on February 9, 1960 (I-R. 88-103), within the three-month period prescribed by Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that funds embezzled in 1956 were includible in taxpayer's ^{1/} income in that year.

2. Whether the Tax Court's finding that taxpayer failed to prove that he had net operating losses in prior years to carry over and apply to income in the year 1956 is clearly erroneous.

3. Whether the Tax Court correctly upheld the Commissioner's disallowance of deductions in 1960 for charitable contributions and repayment of embezzled funds where taxpayer presented no evidence to substantiate the claimed deductions.

4. Whether the Tax Court's finding that taxpayer and his wife each contributed over half the support of one of their two children (allowing each of them to deduct one dependency exemption) is clearly erroneous.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, infra.

1/ The principal issues involved in the case concern only the activities of Grant Naegle, referred to for convenience as "taxpayer". Taxpayer Norma Naegle will be referred to as "taxpayer's wife".

STATEMENT

The facts, some of which were stipulated, were found by the Tax Court (I.R. 54-62), as follows:

Grant and Norma Naegle are husband and wife living in Phoenix, Arizona, with their two daughters. All of their returns were filed with the District Director of Internal Revenue in Phoenix. Taxpayers filed timely joint income tax returns for each of the years 1957, 1958 and 1961. Norma filed timely separate income tax returns for each of the years 1959 and 1960 and Grant filed a separate delinquent income tax return for the year 1960. Prior to April 16, 1957, Grant mailed to the District Director's office a printed 1956 Form 1040 on which he wrote that he had earned nothing in 1956, had been placed in receivership, and had been supported by his wife's separate income for that year. (I-R. 55-56.)

Grant operated a property management and real estate brokerage business in Phoenix, Arizona, under the trade name of Naegle Property Services, from 1951 until August 6, 1956. On October 21, 1958, taxpayer was convicted, upon his plea of guilty, in the Superior Court of Maricopa County, Arizona, of the charge of grand theft by embezzlement. He was given a ten-year suspended sentence conditional upon his repaying the funds to a court-appointed trustee. Pursuant to this judgment, a trust agreement was drawn up on May 8, 1959, under which the trustee was a twenty-page list of 274 unsecured creditors and the amounts of the claims totaling \$71,088.32, and one page showing two claims called "Priority Claims Allowed" totaling \$4,120.82. (I-R. 58.)

The Commissioner of Internal Revenue determined that Grant had income of \$35,715.90 in 1956, of which \$35,000 represented income from the money that he embezzled.^{2/} The remaining \$715.90 was Grant's share in the community income earned by his wife. (I-R. 58.)

On Norma's separate income tax return for 1959, she reported wages received in the sum of \$3,683.52. On Grant's separate income tax return for that year he reported wages in the sum of \$12,226.98. The Commissioner determined that the total wage income of both, or \$15,910.50, was community income, with one-half, or \$7,955.25, taxable on each separate return for that year. This resulted in a determination of overassessment against Grant for the year 1959, and a deficiency in the same amount against Norma for that year. (I-R. 58-59.)

In his 1960 income tax return, Grant reported \$7,944.64 as wages received and deducted \$5,000 paid as partial restitution of the money embezzled in 1956. He also deducted \$300 in charitable contributions to a named (but unreadable) "missionary fund, red cross, and other contributions". The Commissioner disallowed both of the above deductions and determined that one-half of the total of Grant's and Norma's wages was his share of their community income. This gave Grant an overstatement in taxable wages of \$1,818.57 on his return and created an understatement of that amount on Norma's return. (I-R. 58.) The Commissioner also determined that the two children were supported equally by Grant and Norma. Since Norma had taken exemptions for both daughters on all of her returns,

^{2/} The total amount embezzled was \$75,000 which was set off against a \$40,000 net operating loss incurred in the business in that year. (I-R. 47-48, 58.)

he disallowed one exemption on each of Norma's returns but added one to each of Grant's returns. (I-R. 59.)

In the Tax Court, taxpayers claimed that they had entered into an oral agreement that the income of each would remain separate income of that spouse. Grant contended that his business had sustained net operating losses in the years prior to 1956, which should be carried over and set off against his gains from embezzlement in that year. There was no evidence introduced on the issues of deductions taken by Grant on his 1960 return or on the Commissioner's adjustments to exemptions for dependents in the years 1959 and 1960. (I-R. 60-62.)

The Tax Court found that Grant and Norma had made a valid oral agreement under Arizona law to maintain separate property and that the Commissioner erred in treating their earnings as community property. The Commissioner does not seek review of this determination. The Tax Court upheld the Commissioner's finding that Grant had received \$35,000 of income in the year 1956, and held that taxpayer failed to prove the existence of net operating losses from prior years to be offset against this income. The Tax Court also upheld the Commissioner's disallowance of Grant's claimed deductions in 1960, and the allocation of the exemptions between taxpayers in 1959 and 1960. (I-R. 60-62.) Taxpayers filed motions for rehearing which were denied. (I-R. 63-75.) Decisions were entered on November 10, 1965. (I-R. 80-81, 86-87.) From that action, taxpayers have filed and prosecuted the instant petitions for review.

SUMMARY OF ARGUMENT

The Tax Court correctly held that funds embezzled in 1956 were income to taxpayer in that year. The Supreme Court's holding in 1961 (James v. United States, 327 U.S. 404) that money secured through embezzlement must be included in income applies to the years prior to 1961 for the purpose of determining civil tax liability. All of the courts which have passed upon this issue have been unanimous in so holding.

The exact amount includible in income for the year 1956 was computed on the basis of stipulated facts. Taxpayer's principal theory in the Tax Court and in this Court is that he sustained net operating losses in the years 1951 through 1955 which he is entitled to carry over and apply against income received in 1956. It is axiomatic that in order to prevail on this theory, taxpayer must prove the amount of the losses claimed. The evidence adduced at the hearing, rather than showing the extent of the net operating losses, proved only that such losses, if any, were impossible to determine. The Tax Court's finding that taxpayer had no net operating loss carry over to the year 1956 reflects the evidence and is not clearly erroneous.

Taxpayer claimed deductions in the year 1960 for charitable contributions and repayment of funds embezzled in 1956. He offered no evidence to substantiate such deductions, and the Tax Court correctly concluded that he had abandoned the claims. Nothing in his brief in this court would contradict that conclusion.

Taxpayer and his wife had separate income and filed separate returns for the years 1959 and 1960. Taxpayer's wife deducted both dependency exemptions allowable for their two minor children on her returns for those years. The Commissioner determined that she was entitled to deduct only one exemption and that taxpayer must take the deduction for the other exemption on his return. Taxpayer's wife failed to prove in the Tax Court that she had contributed over one-half of the support of both children from her separate income or property under these circumstances, the Tax Court properly upheld the Commissioner's determination that each must take one dependency exemption on his or her separate returns for the years involved.

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THAT
TAXPAYER RECEIVED \$35,000 IN TAX-
ABLE INCOME FROM EMBEZZLED FUNDS
IN THE YEAR 1956

Taxpayer was convicted on his plea of guilty of embezzling funds in the year 1956. His sentence was suspended on condition that he make restitution of the sum wrongfully embezzled in the approximate amount of \$75,000. No part of the embezzled funds was reported on his federal income tax return for that year. The Commissioner allowed taxpayer a deduction of \$40,000 for business losses incurred in that year and determined that he had under-reported his taxable income in the net amount of \$35,000. (I-R. 56, 58.) Taxpayer contends, in the Tax Court and in this Court, that funds embezzled prior to the Supreme Court's

decision in James v. United States, 366 U.S. 213, in 1961 are not includible in income (I-R. 94-95) and that, if they are, the Commissioner's determination of the amount includible in taxable income is arbitrary and capricious (Br. 8, 13-17),^{3/} and that, moreover, he is entitled to apply net operating losses incurred in prior years against income realized in the taxable year 1956 (Br. 8, 36-48). The Commissioner contends that there is substantial evidence in the record to support the finding that embezzled funds in the amount of \$35,000 were properly included in net taxable income in the year 1956 and that there is no evidence of record to substantiate taxpayer's claimed net operating loss carry-overs from prior years. Accordingly, the Tax Court's finding that taxpayer understated his income by \$35,000 for the year 1956 is not clearly erroneous and should be affirmed under established standards of review. Commissioner v. Duberstein, 363 U.S. 278; United States v. Gypsum Co., 333 U.S. 364; Burke v. Commissioner, 283 F. 2d 487 (C.A. 9th); Clark v. Commissioner, 266 F. 2d 698 (C.A. 9th).

A. Embezzled funds are taxable income to the embezzler.

The Supreme Court held in 1961 that embezzled money constitutes taxable income to the embezzler (James v. United States, 366 U.S. 213),

^{3/} Taxpayer Grant Naegle's brief (pp. 50-51) contains the material portions of taxpayer Norma Naegle's argument. For convenience, all "Br." references will be to taxpayer Grant Naegle's brief.

overruling its decision entered in 1946 in Commissioner v. Wilcox, 327 U.S. 404. See also Rutkin v. United States, 343 U.S. 130. Taxpayer urges that James overruled Wilcox only prospectively and that funds embezzled prior to the James decision should, therefore, be excluded from gross income. The Tax Court correctly held, however, that funds taxpayer embezzled in 1956 were includible in gross income for the purpose of computing his income tax liability for that year.

It is true, as this Court had held, that a defendant who embezzled funds in the years before the James decision could not be guilty of a willful criminal evasion of tax since the earlier Wilcox decision--that embezzled funds need not be reported as income--negated the requisite element of criminal intent. Beck v. United States, 298 F. 2d 622 (C.A. 9th), certiorari denied, 370 U.S. 919. Willfulness, however, is not an element in civil tax liability. Indeed, the problem of criminal responsibility for evasion in James would not have occurred had the decision not been specifically premised on the understanding that the reversal of Wilcox was to have retrospective effect with regard to the inclusion of funds in gross income. Otherwise, the defendant in James that embezzled funds are income within the meaning of the Internal Revenue Code was therefore applicable to determine taxpayer's civil tax liability for the year 1956. The cases following James have been unanimous in holding that the decision applied to funds embezzled prior to 1961. United States v. Siano, 356 F. 2d 927 (C.A. 2d); Geiger's Estate v. United States, 352 F. 2d 221 (C.A. 8th), certiorari denied, 382 U.S. 1012; Adame's Estate v. Commissioner, 320 F. 2d 811, 814 (C.A. 5th)

(as to the year 1953, which was not barred by the statute of limitations); Stoller v. United States, 320 F. 2d 340, 344 (Ct. Cl.); Nerem v. Commission, 41 T.C. 338, 344; Muldrow v. Commissioner, 38 T.C. 907, 912; see Leaf v. Commissioner, 295 F. 2d 503 (C.A. 6th). Dicta to the same effect are present in Sowell v. Commissioner, 302 F. 2d 177, 181 (C.A. 5th); Donohue v. Commissioner, 323 F. 2d 651, 652 (C.A. 7th), certiorari denied, 376 U.S. 911; United States v. Goldberg, 330 F. 2d 30, 39 (C.A. 3d), certiorari denied, 377 U.S. 953. All of the above cases except United States v. Goldberg are civil tax cases.

Taxpayer argues (Br. 8, 13-15) that the Commissioner's determination that \$35,000 of the embezzled funds should be included in adjusted gross income was arbitrary and capricious. The \$35,000 figure, however, is based on the following stipulated facts in the record:

Taxpayer was convicted on October 21, 1958, upon his plea of guilty, of grand theft by embezzlement. (I-R. 44-45.) The judgment in that case (Stip. Ex. 10-J) clearly stated that taxpayer had wrongfully embezzled the approximate sum of \$75,000.^{4/} Taxpayer had gross income from his business of at least \$33,890.32 in 1956 (I-R. 47) and incurred expenses of \$71,119.92 (I-R. 48), thus sustaining a loss of \$40,000.

^{4/} The relevant portion of the judgment is reproduced in the Tax Court's opinion at (I-R. 56A.)

^{5/} The \$40,000 figure is generous to the taxpayer since, as stipulated (I-R. 47-48) the \$33,890.32 does not include all of taxpayer's business receipts, but only those deposited in his bank account.

The \$35,000 of unreported income represents the net amount of embezzled funds after the deduction of taxpayer's business losses.

The Commissioner's determination that the total amount of embezzled income was realized in the year 1956 is not disputed by taxpayer, nor is it in any way contradicted by the facts adduced at the hearing. Consequently, the Tax Court correctly held that taxpayer realized income in the amount of \$35,000 which he failed to report in the year 1956.

B. Taxpayer is not entitled to an offset against income in 1956 based upon alleged net operating losses carried forward from prior years

Taxpayer's principal theory in the Tax Court (II-R. 5) and on through review (Br. 21, 35-36, 41-47) is that he was entitled to apply alleged net operating losses in prior years against any gain realized in 1956 under Section 172(a) of the Internal Revenue Code of 1954 Appendix, infra.^{6/} In order to prevail on this theory, taxpayer must prove the amount of the losses claimed, and that they were not absorbed by application to income in other years by carry-backs and carry-over. Johnson v. United States, 291 F. 2d 908 (C.A. 9th); Allied Central Stores, Inc. v. Commissioner, 339 F. 2d 503 (C.A. 2d), certiorari denied, 381 U.S. 903; Marshall v. Commissioner, 240 F. 2d 185 (C.A. 5th).

^{6/} Some of the years (1951-1954) for which taxpayer claims net operating losses come under Section 122(b) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 122) (added to the 1939 Code by Section 211(b), Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 215(a), Revenue Act of 1950, c. 994, 64 Stat. 906) and the (footnote continued on following page)

As the Fifth Circuit said in Marshall v. Commissioner, supra,
at p. 188--

It was incumbent upon petitioners to introduce convincing evidence upon which the Tax Court could fairly and accurately determine any additional allowable deductions. This they failed to do.

The evidence adduced by taxpayer at the hearing, rather than proving the extent of net operating losses, showed only that such losses, if any, were impossible to determined. ^{7/} Taxpayer himself admits that he could never compute the extent of his losses in the taxable years 1954 and 1955. (II-R. 51.) Nelson Tompkins, who took

6/ (footnote continued from preceding page)

transitional provisions of Section 172(g) of the Internal Revenue Code of 1954. Since we argue that taxpayer has failed to prove that he is entitled to any loss carry-over from prior years, the technical variations in treatment of the years in question are not material. See, e.g. Pacific Rock & Gravel Co. v. United States, 297 F. 2d 122 (C.A. 9th); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 932 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4662).

7/ Taxpayer offers evidence on appeal that his counsel never submitted at the Tax Court hearing. This evidence cannot now be presented under Rule 31 of this Court's Rules of Practice. His motions for a new trial to permit the introduction of additional new evidence (I-R. 64-75) were addressed to the sound discretion of the Tax Court. Bankers Coal Co. v. Burnet, 287 U.S. 308; Minneeci v. Commissioner, 368 F. 2d 161 (C.A. 7th); Henry v. Commissioner, 362 F. 2d 640 (C.A. 5); Goodman v. Commissioner, 200 F. 2d 681 (C.A. 2d); Arc Realty Co. v. Commissioner, 295 F. 2d 98, 107 (C.A. 8th); Francis Edward McGillick Foundation v. Commissioner, 278 F. 2d 643, 649 (C.A. 3d). There is no showing that the Tax Court abused its discretion in refusing to grant taxpayer's motion, or that the evidence tendered was not available to his counsel at the time of hearing. See Greenspahn v. Joseph E. Seagr & Sons, Inc., 186 F. 2d 616 (C.A. 2d).

over the business for four or five months in 1956, actually made a profit of \$20,000 in that time. (II-R. 39-41.) He testified that in the years he knew taxpayer (1951-1956), the latter did a "terrific rental business." (II-R. 37.) Mr. Tompkins also stated that taxpayer's "records if you can call them that were chaotic, misplaced and unreliable." (II-R. 43)^{8/} The only other witness on taxpayer's behalf was his sister, Betty Bland, who worked for him from August, 1954, to July, 1956. (II-R. 18-19.) Her testimony was inconclusive at best, and often contradictory. She estimated the loss in 1954 to be \$30,000, based on the amount of payments made to the operating fund (from which expenses were paid) from the escrow fund (monies collected on behalf of landlords and payable to them). (II-R. 27.) Yet, for the year 1955, she stated that "accurate information couldn't be stated because the checks that were drawn on the operating account weren't a true picture of it." (II-R. 29.) Although she claimed to personally record everything that came into the office (II-R. 33), there were ten or fifteen people working on the books (II-R. 32). The testimony adduced at trial, on which taxpayer placed such heavy reliance in his brief, only supports the Tax Court's finding that "The evidence fails completely to show that there were any net operating loss carryovers available to reduce the 1956 income." (I-R. 61.)

^{8/} The taxpayer contends that the trial court erred in admitting only the portion of a letter written by Tompkins which pertained to the question he was being asked on cross-examination, and excluding the rest. (Br. 9, 51-52). The court properly exercised its judicial discretion in limiting the record to such matters as were here relevant, and taxpayer fails to show either abuse of that discretion or that the exclusion was prejudicial.

It is clearly within the province of the trier of fact to evaluate the testimony of witnesses in the light of their demeanor and credibility. Commissioner v. Duberstein, supra; United States v. Gypsum Co., supra; Clark v. Commissioner, supra. See Rule 52(a) of the Federal Rules of Civil Procedure. Taxpayer's failure to introduce convincing evidence upon which the Tax Court could fairly and accurately determine any net loss carry-overs was fatal to his claims, and the Tax Court correctly held that he was not entitled to carryover any of his asserted net operating losses for prior years to the year 1956.

II

THE TAX COURT CORRECTLY HELD THAT
TAXPAYER FAILED TO SUBSTANTIATE
HIS CLAIM TO DEDUCTIONS IN THE YEAR
1960 FOR ALLEGED CHARITABLE
CONTRIBUTIONS UNDER SECTION 170(a)(1)
OF THE INTERNAL REVENUE CODE OF 1954
AND FOR REPAYMENT OF FUNDS EMBEZZLED
IN 1956

Taxpayer claims deductions for the year 1960 for \$5,000 as repayment of funds under the trust agreement entered into in 1956 and for \$300 in alleged charitable contributions.^{2/} (I-R. 58.)

Taxpayer offered no evidence to substantiate the deductions in the

^{2/} Money received by taxpayer under claim of right must be included in income in the year received even though taxpayer is required in a later year to repay the sum. North American Oil v. Burnet, 286 U.S. 417; United States v. Lewis, 340 U.S. 590. Under the claim of right doctrine (which applies to embezzled funds under James v. United States supra), taxpayer can deduct repayments in the year in which they are made. Section 1341 of the Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 1341) (amended by Section 60, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606) provides for tax treatment of the deduction in the year of repayment. It is axiomatic, however, that taxpayer must first prove actual repayment before the question of tax consequences of such repayment is reached.

Tax Court and his only argument on appeal seems to be a semantic quibble, i.e., whether the payment was for embezzled funds or "payment on restitution under sentence of embezzlement, due to operating losses." (Br. 49.) Regardless of what it is called, it seems incredible that taxpayer has no record at all to substantiate the payment of such a large sum of money. The Tax Court's conclusion (I-R. 62) that he had abandoned the claim, in absence of any evidence whatsoever on the issue, was certainly justified.

Commissioner v. Duberstein, supra.

Section 170(a)(1) of the Internal Revenue Code of 1954, Appendix, infra, provides that there shall be allowed as a deduction any charitable contribution (defined in subsection (c)) payment of which is made within the taxable year. It further provides that a charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary or his delegate. A taxpayer claiming a charitable deduction, just as in the case of any other claimed deduction, must be prepared to substantiate the amount of his payments. Bradford v. Commissioner (C. A. 2d), decided April 1, 1965 (15 A.F.T.R. 2d 1106), certiorari denied, 382 U.S. 868; Birnbaum v. Commissioner, 117 F. 2d 395 (C. A. 7th); Panek v. Commissioner; 24 T.C.M. 650, affirmed per curiam September 26, 1966 (C. A. 7th) (18 A.F.T.R. 5981). See Section 1.170-1(a), Treasury Regulations on Income Tax (1954 Code), Appendix, infra. Once again, taxpayer submitted no evidence directed to the substantiation of any of the charitable contributions claimed, or to prove that the contributions were made to organizations which qualify under Section 170(c). See Riker v. Commissioner, 224 F. 2d 220 (C. A. 9th), certiorari denied, 355 U.S. 839. The Tax Court

was justified in concluding that taxpayer had abandoned this issue also. Nothing in his brief in this Court would contradict that conclusion.

III

THE TAXPAYER'S WIFE WAS PROPERLY DENIED DEPENDENCY DEDUCTIONS FOR BOTH CHILDREN WHERE SHE FAILED TO PROVE A CONTRIBUTION OF MORE THAN ONE-HALF OF EACH CHILD'S TOTAL SUPPORT

Taxpayer and his wife, Norma, filed separate returns and maintained separate property for the years 1959 and 1960. They had two minor children. Taxpayer's wife, took both of the dependency deductions allowed by Section 151 of the Internal Revenue Code of 1954, Appendix, infra, on her returns for those years. The Commissioner determined that she was entitled to deduct only one child on his return. The Tax Court upheld the Commissioner's determination because taxpayers failed to show that it was incorrect. (I-R. 62.)

Section 152 of the Internal Revenue Code of 1954, Appendix, infra, permits a taxpayer a dependency deduction for an individual, provided that certain relationship, support, and citizenship or residency tests are met. The burden is on the taxpayer to prove the factors prerequisite to the establishment of the claimed dependency deductions, including the factor of contributions to the support of the individual. Trowbridge v. Commissioner, 268 F. 2d 208 (C.A. 9th); Rezazadeh v. Commissioner, 356 F. 2d 898 (C.A. 7th); Mawhinney v. Commissioner, 355 F. 2d 462 (C.A. 3d).^{10/}

^{10/} Taxpayers' reliance on Goold v. Commissioner, decided January 6, 1949 (8 T.C.M. 2), affirmed, 182 F. 2d 573 (C.A. 9th) (Br. 51), is misplaced. There the court did not disturb the husband and wife's allocation of exemptions because the wife was not a party to the case.

In order to meet the support test, taxpayer's wife must prove that she contributed over half of the "entire amount of support which the individual received." Treasury Regulations on Income Tax (1954 Code), Sec. 1.152-1(a)(2)(i), Appendix, infra. In the instant case, there was no evidence that both children received over half of their support from their mother, apart from her statements that "we lived off of my income." (II-R. 66.) Taxpayer's wife reported income of \$3,683.52 and \$4,307.50 in the years 1959 and 1960, respectively. He reported income in the amount of \$12,226.98 and \$7,944.64, respectively, in the same years. (I-R. 58-59.) The Commissioner reasonably determined that they each contributed one-half of the support of one child from their separate incomes, and that each was, therefore, entitled to deduct one dependency exemption. Evidence to the contrary was essential to the claim of taxpayer's wife, and the Tax Court decision should be affirmed on that basis. Rezazadeh v. Commissioner, supra.

CONCLUSION

For the reasons stated, the decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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Assistant Attorney General.

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Attorneys,
Department of Justice,
Washington, D. C. 20530.

JANUARY, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of January, 1967.

Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 151. ALLOWANCE OF DEDUCTIONS FOR PERSONAL EXEMPTIONS.

(a) Allowance of Deductions.--In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

*

*

*

(e) Additional Exemption for dependents.--

(1) In general.--An exemption of \$600 for each dependent (as defined in section 152)--

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than \$600,

*

*

*

(3) Child defined.--For purposes of paragraph (1) (B), the term "child" means an individual who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the taxpayer.

*

*

*

(26 U.S.C. 1964 ed., Sec. 151.)

SEC. 152. DEPENDENT DEFINED.

(a) General Definition.--For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,

*

*

*

(26 U.S.C. 1964 ed., Sec. 152.)

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) Allowance of Deduction.--

(1) General rule.--There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the

taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

*

*

*

(26 U.S.C. 1964 ed., Sec. 170.)

SEC. 172. NET OPERATING LOSS DEDUCTION.

(a) Deduction Allowed.--There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) [as amended by Sec. 317(b), Trade Expansion Act of 1962, P.L. 87-794, 76 Stat. 872] Net Operating Loss Carrybacks and Carryovers.--

*

*

*

(2) Amount of carrybacks and carryovers.--Except as provided in subsections (i) and (j), the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the "loss year") shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. ***

*

*

*

(c) Net Operating Loss Defined.--For purposes of this section, the term "net operating loss" means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. ***

*

*

*

(26 U.S.C. 1964 ed., Sec. 172.)

Treasury Regulations on Income Tax (1954 Code):

§1.152-1 General definition of a dependent.

*

*

*

(2) (i) For purposes of determining whether or not an individual received, for a given calendar year, over half of his support from the taxpayer, there shall be taken into account the amount of support received from the taxpayer as compared to the entire amount of support which the individual received from all sources, including support which the individual himself supplies. ***

*

*

*

(26 C.F.R., Sec. 1.152-1.)

§ 1.170-1 [as amended by T.D. 6785, 1965-1 Cum. Bull. 117]
Charitable, etc., contributions and gifts; allowance
of deduction.

(a) In general.---***

(2) Information required in support of deductions for taxable years beginning before January 1, 1964. In connection with claims for deductions for charitable contributions paid in taxable years beginning before January 1, 1964, taxpayers shall state in their income tax returns the name and address of each organization to which a contribution was made and the amount and approximate date of the actual payment of each contribution. Any deduction for charitable contribution must be substantiated, when required by the district director, by a statement from the organization to which the contribution was made indicating whether the organization is a domestic organization, the name and address of the contributor, the amount of the contribution, and the date of its actual payment, and by such other information as the district director may deem necessary.

*

*

*

(26 C.F.R., Sec. 1.170-1.)



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL H. GROVE,

Petitioner-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent-Appellee.

NO. 20882

APPELLEE'S BRIEF

Appeal from the United States
District Court for the Northern
District of California
Southern Division

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI,
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FILED

JUL 6 1966

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL H. GROVE,

Petitioner-Appellant,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent-Appellee.

NO. 20882

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2248. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant, petitioner below, has appealed from an order of the United States District Court for the Northern District of California, Southern Division.

denying his application for a writ of habeas corpus.

A. Proceedings in the State Courts

On August 30, 1962, appellant Michael H. Grove, was convicted in the Superior Court of San Diego County upon his plea of guilty, while represented by appointed counsel, of the felony offense of first degree murder in violation of California Penal Code section 187. He was sentenced on that same day to imprisonment in the State prison for the term prescribed by law.

The appellant did not appeal the above conviction. Rather, three years later, he filed a petition for writ of habeas corpus in the Superior Court of Marin County. That petition was denied on September 20, 1965. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court which was denied without opinion on October 20, 1965. Substantially, the same factual and legal issues now presented to this Court were raised in those petitions.

B. Proceedings in the Federal Courts

On October 29, 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. The Honorable William T. Sweigert denied appellant's petition for a writ of habeas corpus by an order filed on January 11, 1965, without issuing

an order to show cause. The basis of the Court's order was that the rule announced in Escobedo v. Illinois, 378 U.S. 478 (1964) does not apply retrospectively. On March 23, 1966, Judge Sweigert granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis.

A notice of appeal was filed by appellant on January 21, 1966.

In his petition to the District Court appellant alleged his plea of guilty was prompted by a confession obtained in violation of the Escobedo rule. Appellant also contended the failure to afford him counsel at his prearraignment questioning in violation of the Escobedo rule constituted ineffective aid of counsel. Appellant argued further that his plea was premised on a confession obtained by threats and promises of leniency.

APPELLANT'S CONTENTIONS

On this appeal appellant contends his plea of guilty was (1) coerced by a confession which was both involuntary and obtained in violation of the Escobedo rule, and, (2) vitiated because of ineffective aid of counsel. Appellant thus poses the question whether these allegations present grounds for relief on habeas corpus.

/

SUMMARY OF APPELLEE'S ARGUMENT

I. Petitioner's plea of guilty forecloses collateral attack on his conviction on the alleged ground that it resulted from an illegally obtained confession.

II. The Escobedo rule does not apply retroactively.

III. Appellant's voluntary plea of guilty prevents collateral attack on his judgment of conviction on the asserted ground of ineffective representation by counsel.

ARGUMENT

I

PETITIONER'S PLEA OF GUILTY FORECLOSSES
COLLATERAL ATTACK ON HIS CONVICTION ON
THE ALLEGED GROUND THAT IT RESULTED FROM
AN ILLEGALLY OBTAINED CONFESSION.

This Court may take judicial notice of appellant's judgment of conviction in the Superior Court of the State of California for the County of San Diego on October 30, 1962. Kasey v. Molybdenum Corporation of America, 336 F.2d 560, 561 (9th Cir. 1964); Smith v. Settle, 212 F.Supp. 622 (D.C. Mo., 1962); U.S. Ex rel. Holly v. Keenan, 107 F.Supp. 266 (D.C. Pa. 1952). This judgment, which does not appear in the record on appeal, is attached as Exhibit "A" of this brief for the convenience of the Court. This judgment indicates that appellant entered a plea of guilty, while represented by counsel, to the crime of murder of the first degree.

Appellant's conviction and sentence therefore are based solely and entirely upon his plea of guilty and not upon any evidence which may have been improperly acquired by the prosecuting authorities. Townsend v. Burke, 334 U.S. 736 (1948); Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964). Even if appellant's decision to plead guilty was influenced by the antecedent obtaining of an allegedly inadmissible confession, the federal courts have consistently held that the claim that inadmissible evidence induced a plea of guilty is no basis for setting aside a conviction. Sullivan v. United States, 315 F.2d 304 (9th Cir. 1963), cert. denied, 375 U.S. 910; Morse v. United States, 295 F.2d 30 (8th Cir. 1961); United States v. Miller, 293 F.2d 697 (2d Cir. 1961); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); United States v. Kniess, 264 F.2d 353 (7th Cir. 1958), cert. denied, 359 U.S. 947; Waley v. Johnston, 137 F.2d 117 (9th Cir. 1944), cert. denied, 321 U.S. 779. Having entered a plea of guilty while represented by counsel, appellant cannot now attack his conviction on the ground that an involuntary confession induced that plea.

II

THE ESCOBEDO RULE DOES NOT APPLY RETROACTIVELY.

In both his petition to the District Court of Appeal for a writ of habeas corpus, and his brief to this court seeking reversal to the order denying the writ, appellant also bases his attack upon his state conviction on the retroactive application of Escobedo v. Illinois, 378 U.S. 478 (1964). He contends that the charges to which he pled guilty were supported in part by statements elicited from him in violation of the Escobedo rule.

This case is governed by Johnson v. New Jersey, 34 U.S. L.Week 4592 (June, 1966), in which the Supreme Court of the United States has definitely declared that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. As noted above, the proceedings which culminated in the judgment that petitioner now seeks to collaterally attack began and were concluded in 1962, long before the date of the Escobedo decision. Consequently, appellant's petition to the District Court did not state grounds for relief and was properly denied.

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/

/

III

APPELLANT'S VOLUNTARY PLEA OF GUILTY PREVENTS COLLATERAL ATTACK ON HIS JUDGMENT OF CONVICTION ON THE ASSERTED GROUND OF INEFFECTIVE REPRESENTATION BY COUNSEL.

Appellant here argues that he entered his plea of guilty upon the advice of counsel. Appellant's argument, however, is not that he was deprived of effective aid of counsel. Rather, appellant argues lack of assistance of counsel in violation of the Escobedo rule.

"It is not that appellant puts the blame on counsel so much as the fact that in all probability counsel was right in his urging appellant to enter a plea of guilty simply because he was aware that the conviction was already assured by the illegally obtained confession." [Emphasis added] (AOB 9-10).

Appellant, it would appear, has merely couched his Escobedo argument in language that suggests appellant was deprived effective aid of counsel. Appellant's essential contention, however, is that he was denied right to counsel in violation of the Escobedo rule. The Escobedo rule, however, does not apply retroactively (see Argument II, supra) and therefore appellant does not state grounds for relief.

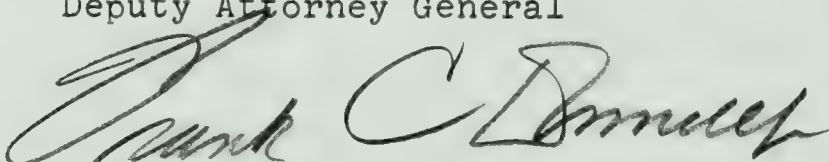
CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: July 5, 1966.

THOMAS C. LYNCH, Attorney General
of California

ROBERT R. GRANUCCI
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
Deputy Attorney General

Attorneys for Respondent-Appellee

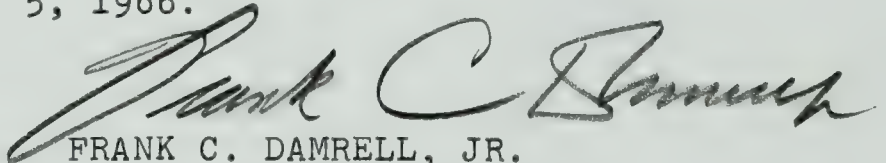
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

July 5, 1966.

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
Deputy Attorney General
of the State of California

E X H I B I T "A"

(2) Defendant was not (was or was not) adjudged an habitual criminal within the mean-

ing of subdivision (a) or (b) of section 644 of the Penal Code and the defendant is not (is or is not) an habitual criminal in accordance with the provisions of subdivision (c) of that section.

(3) It is, therefore, ordered, adjudged and decreed that the said defendant be punished by imprisonment in the state prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the County of San Diego, and by him delivered to the Director of Corrections of the State of California at California Institution for Men at Chino, forthwith

It is Ordered that sentences shall be served in respect to one another as follows: (c/c or c/s)

and in respect to any prior incompleated sentences as follows: (c/c or c/s)

(4) To the Sheriff of the County of San Diego, and to the Director of Corrections at California Institution for Men at Chino,

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at California Institution for Men at Chino, Forthwith.

WITNESS my hand and Seal of said Court this 30th day of October 1962.

R. B. JAMES, Clerk.

By Heber Lewis
HEBER LEWIS Deputy

STATE OF CALIFORNIA,)
County of San Diego,) ss.

I DO HEREBY CERTIFY the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided in Penal Code section 1213.

ATTEST my hand and seal of the Superior Court this 30th day of October, 1962.

R. B. JAMES,
County Clerk and ex-officio Clerk of the Superior
Court of the State of California, in and for the
County of San Diego

By Heber Lewis
HEBER LEWIS Deputy

Gerald C. Thomas
Judge of the Superior Court of the State of California, in and for the County of San Diego.
GERALD C. THOMAS

THE WRITING OF THIS
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ON FILE IN THIS OFFICE
AT 11:00 AM

W. Schuch
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(AFFIX SEAL)

FORM 1A CO. CLK. 11-80 2M PLAZA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBEN HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
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Attorneys for Appellee,
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FILED

JUL 21 1966

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBEN HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
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Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBEN HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On September 29, 1965, a one-count indictment was returned by the Federal Grand Jury for the Central Division of the Southern District of California, charging appellant with the concealment of illegally imported narcotics in violation of Title 21, United States Code, Section 174 [C. T. 2].^{1/}

A jury trial commenced on November 1, 1965, before the Honorable William J. Lindberg; and on November 3, 1965, the jury returned a verdict of guilty [C. T. 30-33].

On November 8, 1965, Judge Lindberg sentenced appellant

^{1/} C. T. refers to Clerk's Transcript of Record.

to imprisonment for a term of seven years [C. T. 34, 45]. Appellant then filed a timely notice of appeal [C. T. 38].

The District Court had jurisdiction of this case based upon Section 3231, Title 18, United States Code, and Section 174, Title 21, United States Code. The jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294, and Rule 37, Federal Rules of Criminal Procedure.

II

SPECIFICATION OF ERROR

1. Whether on the issue of guilty knowledge the District Court erred in admitting evidence of an alleged similar possession of heroin by appellant on a prior occasion.

2. Whether an acquittal of the prior offense precludes admitting such evidence in the trial of this offense.

III

STATEMENT OF FACTS

On June 26, 1965, at approximately 3:00 o' clock in the morning, appellant was arrested in Monterey Park for drunk driving. Appellant was alone at the time [R. T. 57-58].^{2/} Incidental to the arrest, the officer searched the automobile and

^{2/} R. T. refers to Reporter's Transcript of Proceedings.

discovered under the driver's seat a brown paper bag containing seven contraceptives filled with heroin [R. T. 59-60, 108-109]. The heroin weighed approximately 171 grams [R. T. 108].

The officer asked appellant what the substance was. Appellant replied, "I don't know. I've never seen it before." [R. T. 62]. Appellant further stated that he had recently purchased the automobile [R. T. 63].

As evidence of guilty knowledge, the Court permitted the Government to prove that on January 14, 1965, five contraceptives containing about 38 grams of heroin were found in another automobile driven by appellant. This occurred after he had left the vehicle at a service station in Monterey Park for repairs. An attendant discovered the narcotics under a rubber mat in the trunk [R. T. 75-86, 108-09].

Appellant made timely objection to this evidence, contending that it was irrelevant, and that it was barred by the doctrine of res judicata since he had stood trial for the earlier offense in March and was acquitted [C. T. 17, R. T. 35-37]. The objection was overruled.

In admitting the evidence, the Court was careful to caution the jury on the effect of the alleged prior offense. At the opening of the trial the Court said:

"As you know, this case charges the defendant here with possession of heroin contrary to law. The United States Attorney in his opening statement and in the course of submitting evidence is going to

make some reference to another case in which this defendant was involved. It involved an alleged possession of an alleged narcotic, heroin. The defendant was tried in that case and found not guilty, so that transaction, as far as an offense or violation of law, has been passed upon by another jury, and of course he cannot be tried for that offense again at all.

"I have concluded under the law that the fact of possession, if you find that he did have possession of heroin, or had possession in an automobile at that time, if you find that he did have possession and that that substance was heroin, that could be considered for a very limited purpose, and that would be whether or not the alleged possession here was a knowing possession.

"It is necessary for the Government to prove in this case that if there was possession of heroin, that the defendant knowingly had it. A person cannot be convicted or found guilty of possession of something if they were unwittingly in possession of it or had no knowledge of possession of it. In other words, someone else might have put it there.

"So when reference is made to this earlier case I want you to be very cautious that you do not give it undue emphasis or consideration, because

it only goes to the very limited question of whether or not any possession that may have been had here was a knowing possession, and that is all. And, of course, in order to come to that point you have to conclude that the earlier instance which will be referred to, that there was heroin involved and that it was knowingly possessed. So there is the fact that it might be coincidence that there was unknowing possession twice, but it certainly is possible. That is a matter for argument and for the jury to determine, but I tell you this in advance, which is something I very seldom do, because it is very prejudicial and the jury should not give it undue consideration." [R. T. 48-49].

After the evidence was admitted the Court instructed:

"Now, in connection with these exhibits, members of the jury, . . . Exhibits 2 and 3 relate to the alleged narcotics that were involved in the earlier case which was allegedly involved in the transaction at the service station in January which incident later came to trial in March wherein the defendant was found not guilty.

"Now, these Exhibits relate to the material or substance found in the Plymouth when the tires were changed in January.

"Now, as I indicated to you at the outset

before the evidence came in or even before opening argument, you must be cautious to consider that transaction only insofar as it may have some bearing on the knowledge, if you find that it does have bearing, that the defendant may have had, in the event you find that the material included in Exhibit No. 1 was found in the automobile as stated and in the event you find it to be a narcotic. It relates only to knowledge.

"Now I want to be sure that you are not trying this defendant on what happened back in January, that is what I want to be certain about. The defendant has already been found not guilty in connection with that case." [R. T. 112-13].

In instructing the jury at the close of the case the Court charged:

"The government in this case has offered evidence relating to the presence of heroin in an automobile driven by the defendant on a previous occasion. This evidence may be considered by you only on the limited issue of knowledge or intent, if any; that is, whether the accused knowingly had possession of the heroin charged in the indictment.

"If you should find that on different occasions within a short period of time heroin was present under similar or somewhat similar circumstances

in an automobile driven by the accused, you may infer that the presence of heroin may have been due to the deliberate and knowing act of the accused. However, it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant the inference which I have just described, and to determine how much weight, if any, should be given to this inference. " [R. T. 235-36].

The prior owner of the automobile driven by appellant on June 26, 1965, testified that he sold appellant the vehicle on May 27, 1965, that while he owned the car only he used it, and that before selling the vehicle he cleaned it out and nothing was under the front seat [R. T. 70-72].

Appellant did not take the stand. By way of defense evidence was offered tending to show that appellant had on occasion lent his automobiles to his brother Edmund Hernandez, that Edmund was using narcotics, that in January, 1965, Edmund was arrested for the possession of heroin, and that on August 4, 1965, Edmund failed to appear at his trial [R. T. 116-186]. The Court admitted this evidence over objections as to relevancy because of the wide scope of proof previously afforded the Government in connection with the prior offense [R. T. 140-41, 189].

IV

ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE HEROIN PREVIOUSLY DISCOVERED IN APPELLANT'S AUTOMOBILE FOR THE PURPOSE OF SHOWING GUILTY KNOWLEDGE.
-

The Government submits that this was an appropriate case for the admission of evidence of a prior offense. The heroin in question, seven ounces, was recovered not from appellant's person but from under the driver's seat of his automobile. When questioned about the substance, appellant denied knowing what it was. It thus became crucial in the Government's case-in-chief to introduce additional evidence of guilty knowledge.

The evidence of the earlier offense was particularly probative of guilty knowledge. The discovery of heroin at the gas station was fairly recent, occurring five months before. In each instance a substantial amount of heroin was found; it was wrapped in identical containers; and it was transported in an automobile driven by appellant. Because of these similarities, a strong inference arises that the concealment and transportation of the heroin the second time was not done unwittingly, but in fact, knowingly.

Professor Wigmore describes the reasoning process as follows:

"The argument here is purely from the point of view of the doctrine of chances, - - the instinctive

recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is preceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

"Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i. e. as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small"

2 Wigmore, Evidence §302 (3d ed. 1940).

The admissibility of prior narcotic offenses has long been

recognized by this Circuit as relevant to the issue of knowledge and intent. In Enriquez v. United States, 314 F.2d 703, 713 (9 Cir. 1963), this Court stated:

"There is no question but that on the limited issue of intent, it is not error to permit the introduction of evidence as to the prior possession of heroin by any defendant charged with possession, transportation or sells heroin, or facilitating such possession, transportation or sale."

Accord: Cook v. United States, 354 F.2d 529 (9 Cir. 1965);

Wright v. United States, 192 F.2d 595 (9 Cir. 1951);

Anthony v. United States, 256 F.2d 50 (9 Cir. 1958);

Medrano v. United States, 285 F.2d 23 (9 Cir. 1960).

See also Nye & Nissen v. United States, 336 U.S. 613 (1949), and United States v. Randenbush, 33 U.S. (8 Pet.) 183, 184 n. (1834), for the general admissibility of prior offenses on the issue of knowledge.

Furthermore, the usual reasons for excluding evidence of a prior crime are not really present in the instant case. Generally such exclusion is based on the principal that a conviction should not result from proof of the defendant's bad character or criminal propensities. Here, the heroin found in appellant's automobile on the first occasion was not linked directly with appellant, as might be the case had he been selling it personally to an undercover agent. Nor did the evidence indicate that appellant was disposed

to criminal activities. It was simply an objective circumstance which the fact-finder could consider in negating the possibility of accident or coincidence and showing guilty knowledge on the part of appellant.

Quite similar to the case at hand is the California decision in People v. Torres, 98 Cal. App. 2d 189, 219 P. 2d 480 (4th Dist. 1950). There an automobile in which the defendant was a passenger was stopped by a patrolman because of suspected drunk driving. In searching the automobile, the officer found four marihuana cigarettes under a blanket covering the front seat. At the trial the defendant denied knowledge of the marihuana cigarettes. On cross-examination he was then asked if it were not a fact that approximately four months previously his car was confiscated because it had marihuana in it. The defendant admitted this was so. The Appellate Court sustained the admissibility of this evidence, ruling that such evidence "was a circumstance tending to show that he falsified in disclaiming knowledge of the presence of the marihuana, and it was relevant in disproving defendant's claim of lack of knowledge." Id. at 482.

Similar situations are also found in Wallace v. State, 359 P. 2d 479 (Sup. Cr. Ne. 1961), and People v. Toms, 163 Cal. App. 2d 123, 329 P. 2d 90 (4th Dist. 1958).

It should further be noted that Judge Lindberg repeatedly and carefully advised the jury of the limited nature of the evidence of the prior offense. In so doing, he went beyond the minimum requirements of the law; for as this Court has noted, evidence of

previous possession to show knowledge has been upheld even without cautionary instructions. See Cook v. United States, supra, at 533. In addition, the judge afforded the defendant a very broad scope in presenting his defense. It is thus apparent that the court made every effort to afford appellant a fair trial.

In summary we submit that the evidence was highly probative on the issue of guilty knowledge, and that in admitting the evidence with appropriate instructions to the jury the trial court exercised its sound discretion.

**B. EVIDENCE OF THE PRIOR OFFENSE
WAS NOT RENDERED INADMISSIBLE
BY THE FACT THAT THE DEFENDANT
WAS ACQUITTED AT THE TRIAL OF
THAT OFFENSE.**

Almost all of the courts that have passed on this issue have held that where proof of another offense is relevant to a material issue at the trial, such as intent, knowledge, motive, identity, etc., such evidence is admissible despite the fact that the defendant has been acquitted of the former offense. See Annot., "Admissibility of Evidence as to Other Offense as Effected by Defendant's Acquittal of that Offense", 86 A. L. R. 2d 1132 (1962). This is the view accepted by this Circuit.

In Himmelfarb v. United States, 175 F. 2d 924, 941 (9th Cir. 1949), the defendant was tried for income tax evasion for the years 1942, 1943 and 1944. The defendant was convicted for

the 1944 offense and acquitted of the prior two years. The defendant then moved to strike the evidence as to the earlier years. The trial court denied the motion. In affirming, this Court ruled that, despite the acquittal, the evidence of the earlier offenses was admissible on the issue of intent and state of mind.

In Buatte v. United States, 350 F. 2d 389 (9th Cir. 1965), the defendant had been acquitted of a charge of murder. Thereafter, he was tried for a related assault with intent to commit murder on another person, and at this trial the evidence of the earlier murder was admitted on the issue of intent. This Court ruled that "even though the murder conviction was set aside and an acquittal entered, the evidence that Buatte shot Alice Secody was relevant to show that his shooting of Dan Secody was not a mistake or accident, and it was relevant to the issue of intent". Id at 395.

The only other federal decision found on point is in accord with this view. In Pilcher v. United States, 113 Fed. 248 (5th Cir. 1902), the defendant was indicted for removing distilled spirits from a warehouse. The trial court admitted testimony that on the night before the crime the defendant broke the lock on the warehouse, notwithstanding the fact that the defendant had already been acquitted on that charge. The Court of Appeals affirmed, holding the evidence was relevant and that the prior acquittal was not a bar to its introduction.

In the case at hand, the doctrine of res judicata should not operate to exclude evidence of a prior possession of heroin by

appellant. In the first trial, only a general verdict of not guilty was returned by the jury. That verdict does not necessarily negate the fact that appellant drove the automobile into the gas station, or that a powdery substance was found in the trunk, or that this powder was heroin. In fact, quite likely all of these facts were found to be true by the jury. Appellant was evidently acquitted because there was not sufficient evidence to convince the jury beyond a reasonable doubt that appellant knew of the heroin in the car.

In People v. Frank, 28 Cal. 507 (1865), evidence of a prior forgery was held admissible despite the fact that the defendant had been acquitted of that offense. In dealing with a similar objection of res judicata the Court said at 516-17:

"In order to render the verdict and judgment of not guilty upon the draft offered in evidence conclusive upon the facts which the prosecution sought to prove for the purpose of showing guilty knowledge, it must appear with certainty from the evidence offered in support of the alleged estoppel that those were directly and necessarily found by the verdict in that case in favor of the defendant; or, in other words, that the jury could not have found the verdict which they did without having passed directly upon the facts offered to be proved, and found them against the prosecution; for if it be doubtful upon which of several points the verdicts were founded,

it will not be an estoppel as to either. "

An acquittal merely means that the required degree of guilt was not produced at the former trial. The acquittal does not rob the facts brought out at that trial of their probative value and does not prevent such evidence from being introduced in a subsequent trial. I Wharton, Criminal Evidence § 246.1 (1966 Supp. 12th Ed.); Lee v. State, 9 Ga.App.413, 69 S. E. 310 (1910). An analogous situation occurred in United States v. Randenbush, 33 U. S. (8 Pet.) 183 (1834) (Marshall, Ch. J.). There the defendant was indicted for passing a counterfeit note. In opposition to the indictment, he pleaded that the note had been previously given in evidence against him at a former trial for passing counterfeit notes and that he had been acquitted of that earlier charge. The high court held that the plea was not a bar to the indictment.

Insofar as State v. Little, 87 Ariz. 295, 350 P. 2d 756 (1960), cited by appellant, conflicts with the generally accepted view, we submit the case is wrong. However, certain facts present in that case should be noted: The evidence of a prior narcotic sale was offered not on the issue of intent or knowledge but for the purpose of showing a common plan, scheme and design. The court specifically held that the evidence did not support this inference and was consequently irrelevant. Further, the court observed that any relevance of the prior sale depended on proof of the criminality of that prior sale, and in this connection the prior verdict of acquittal had in fact determined the issue of

criminality against the State. Consequently the matter was res judicata. The Court stated:

"Thus, if the acquittal is based on an implied finding that the product sold was not sufficiently proved to be a narcotic or that defendant did not know that it was such, the sale could not reasonably be part of a plan knowingly to sell narcotics unless the jury in the instant action is permitted to find, contrary to the finding of the jury in the first action, that the defendant illegally and knowingly sold what was in fact a narcotic."

The other case cited by the appellant, People v. Ulrich, 30 Ill. 2d 94, 195 N. E. 2d 180, is in accord with appellee's position. The Court specifically stated that the doctrine of estoppel does not apply so as to preclude the evidence brought out in the first trial. The reason for the reversal was the fact that the prior offense had no relevance to proving the offense for which the defendant was presently standing trial.

The appellant also contends that it is unfair to require him in order to avoid conviction to again refute his commission of a prior offense. In light of the fact that the defendant did not take the stand, we submit that this contention is not meritorious. Furthermore, there would be no more unfairness in this case than in the situation where a prior conviction is offered to prove knowledge. In this latter instance, the defendant again has to

answer for the prior offense. Yet such evidence has always been held admissible.

V.

CONCLUSION

Under the circumstances of this case, the probative value of the earlier offense far outweighed any prejudicial effect, and was properly admitted by the trial court. The jury was carefully instructed as to the purpose of this evidence and appellant's rights were vigilantly guarded by the trial judge. The admissibility of this evidence was not affected by the prior acquittal. We submit the conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

JAN 27 1967

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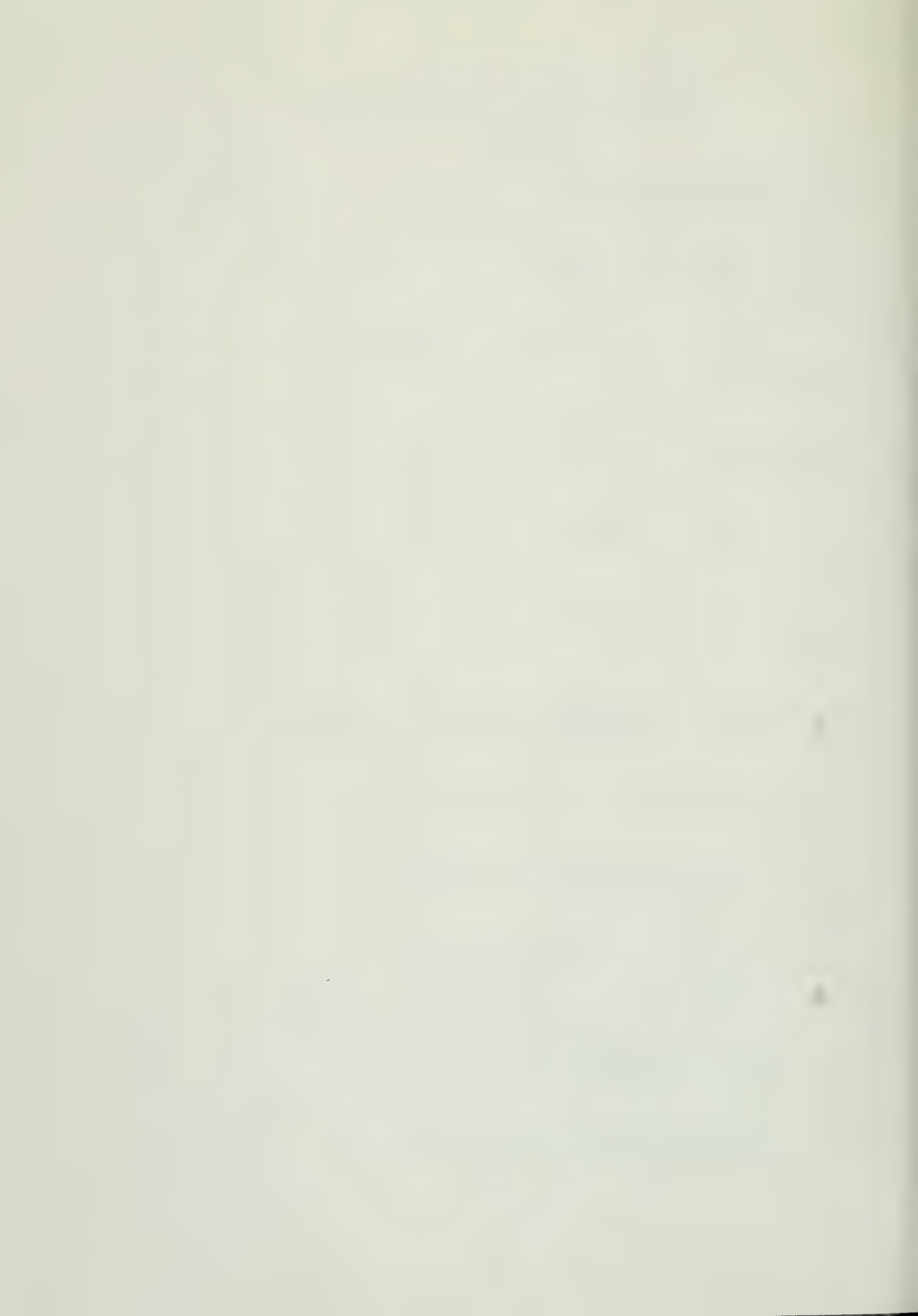
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APPELLEE'S BRIEF

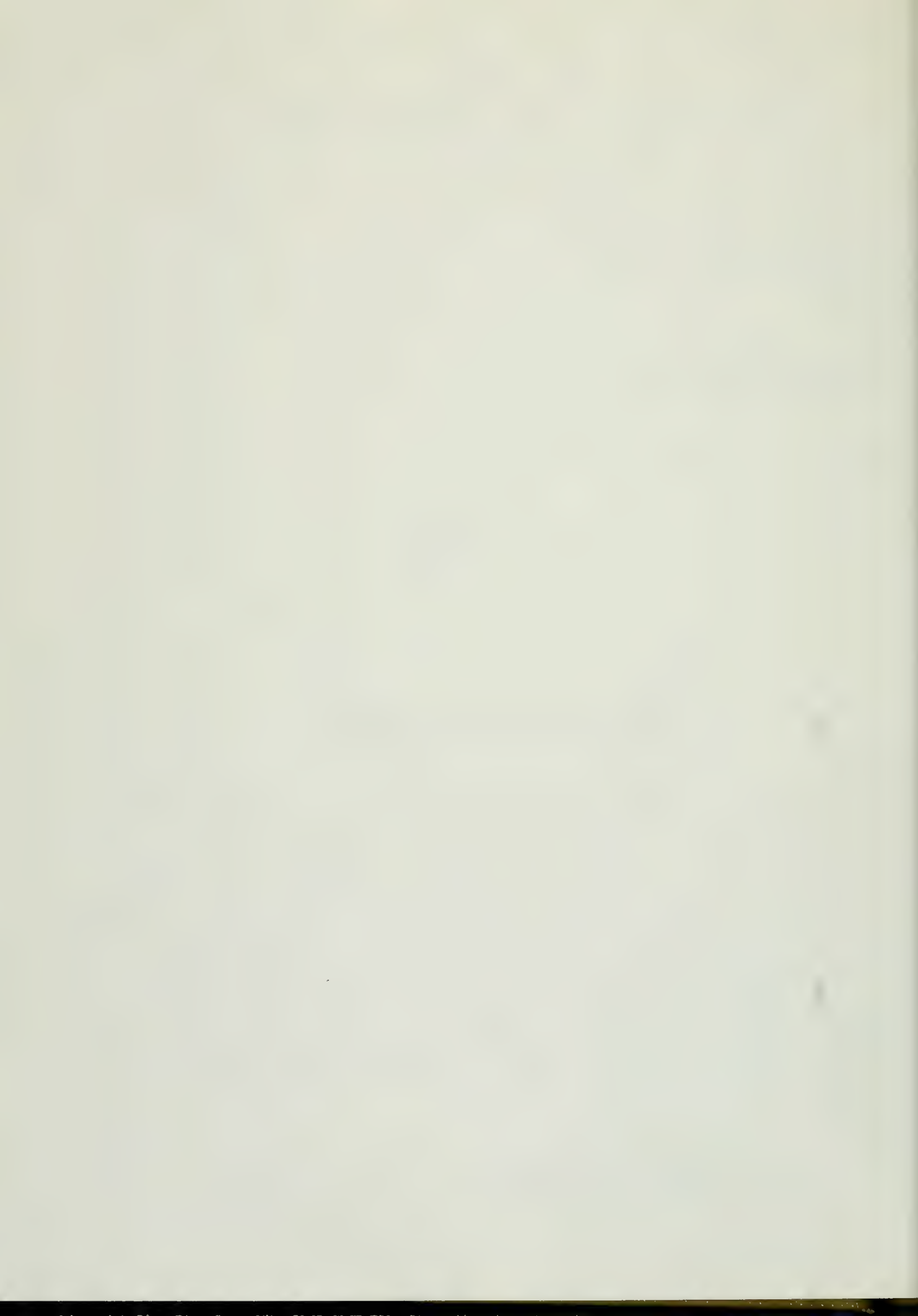
I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Central Division, adjudging appellant to be guilty as charged in both counts of a two count indictment at the conclusion of a court trial [C. T. 8].^{1/}

The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2113(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

^{1/} "C. T. " refers to the Clerk's Transcript of record.



II

STATEMENT OF THE CASE

Appellant was charged with two counts, in a two count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant, Lanier Allison Ramer, by force and violence and by intimidation, knowingly and wilfully took from Mary Jane Peppard, teller, \$970.00, belonging to, and in the care, custody, control, management and possession of Bank of America, Sunset-Echo Park Branch, 1572 Sunset Boulevard, Los Angeles, California, a bank whose deposits were insured by the Federal Deposit Insurance Corporation [C. T. 2].

Count Two charges that appellant, Lanier Allison Ramer, by force and violence and by intimidation, knowingly and wilfully took from Mary Byrne, teller, \$590.00, belonging to, and in the care, custody, control, management and possession of Crocker-Citizens National Bank, Seventh and Alvarado Branch, 2044 West Seventh Street, Los Angeles, California, a national bank, a member of the Federal Reserve System and a bank whose deposits were insured by the Federal Deposit Insurance Corporation [C. T. 3].

A Court trial of appellant, Lanier Allison Ramer, commenced on March 12, 1965, before United States District Judge Gus J. Solomon, and appellant was found guilty as charged [C. T. 8]. On March 12, 1965, the appellant was "sentenced to the maximum period on Count One only, for study as described in Title 18, Section 4208(c), the results of the study to be furnished this Court



within three months, where upon sentence of imprisonment shall be subject to modification in accordance with Title 18, Section 4208(b). " Count Two was stayed pending results of said study [C. T. 9].

On August 27, 1965, the appellant was sentenced to the custody of the Attorney General for a period of ten years, said sentence to include the time defendant has already served. Defendant to become eligible for parole at such time as may be determined by the Parole Board. Same sentence as to Count Two, to run concurrently with sentence imposed in Count One [C. T. 11]. Appellant thereafter filed a timely notice of appeal [C. T. 12].

III

QUESTIONS PRESENTED

1. Whether the District Court committed error in holding that the Prosecution had sustained its burden of proving the appellant's sanity?

2. Whether the District Court committed error in admitting appellant's confession to the two bank robberies of November 11, 1964, when it was established that at the start of the interview, the appellant was advised by the F. B. I. , who was questioning the appellant, that he did not have to furnish any information, that any information he did furnish could be used against him in a court of law, and if he did not have an attorney, a judge would appoint one for him?

3. Whether the Fifth Amendment due process clause requires uniformity by the various Circuit Courts of Appeals of their application of test of criminal responsibility?

IV

STATEMENT OF FACTS

On November 11, 1964, the appellant at about 1:50 P. M. , entered the Bank of America, Sunset-Echo Park Branch, in Los Angeles. On approaching teller Mary Jane Peppard, he stated: "give me all the money you have got from hundred dollar bills down" [R. T. 6, 7], ^{2/} and when she momentarily hesitated, he stated, "I'm not kidding" [R. T. 7]. As the appellant stood in the front of her he kept his right hand in his coat pocket as if simulating his holding of a gun in his coat pocket. As she bent over while taking currency from her cash drawer, appellant stated, "don't step on it" [R. T. 8], referring to an alarm. She turned over some single dollar bills, and he said, "No, not that, the 20's". She gave the appellant a number of twenty dollar bills with some decoy money [R. T. 7]. Mary Peppard testified that the appellant appeared nervous and she recalled she could smell a light smell of alcohol on his breath.

On November 11, 1964, shortly after 2:00 P. M. , appellant entered the Crocker-Citizens National Bank, Seventh and Alvarado

^{2/} "R. T. " refers to Reporter's Transcript of Record.

Branch, and stood behind a customer, who was being waited on by teller Mary Byrne. After the customer left the window, the appellant stepped up to Mrs. Byrne and said, "Give me all the tens and twenties you have" [R. T. 12]. Mrs. Byrne placed on her counter loose ten and twenty dollar bills, which the appellant immediately put in his coat pocket, and walked out of the bank by the front door. Mrs. Byrne immediately reported the robbery to the Assistant Manager, who observed the appellant enter a vehicle and got the license number [R. T. 12]. Within minutes after the robbery the getaway car used by the appellant was located parked on the Southwest corner of Bonnie Brae and West Ninth Street, across from Mac's Lounge on West Ninth Street [R. T. 16]. Patrolman N. D. Murrer entered Mac's Lounge, and observed appellant jump up, and run to the rear to the restroom. The appellant barricaded himself in the restroom and refused to come out. Detective Sam Massender, of the Los Angeles Police Department fired a shot through the restroom door and the appellant immediately came out and was placed under arrest [R. T. 17]. In a wastebasket in the men's room was found a slip of paper bearing the appellant's name, along with a total of \$1,392.00, including several bills with bait money serial numbers from the two banks [R. T. 21]. A search of the appellant's pants pocket revealed \$161.00, including numerous bills with recorded serial numbers taken in the robberies.

The appellant was interviewed by Agent Emmit J. Murphy of the Federal Bureau of Investigation in the presence of Detective



Richard Reed, Los Angeles Police Department, on November 11, 1964, starting at about 4:05 P. M. , at the Los Angeles Police Department [R. T. 28].

At the start of the interview the appellant was advised by Agent Murphy, that he need not furnish any information, and any information furnished by him would be done freely and voluntarily without any threats being made to him, that any information he might furnish could be used against him in a court of law, that he had a right to consult an attorney before making any statement, and that if he did not have an attorney, an attorney would be provided for him by the judge [R. T. 29, 30].

The appellant indicated that he would talk to the Agent, but he first wanted to talk to his wife. He tried on two occasions, for twenty and fifteen minutes each time, but was not able to reach her [R. T. 31, 32].

The appellant related his version of the bank robberies to Agent Murphy. Agent Murphy testified, "he said because of his financial difficulties, he decided to rob a bank" [R. T. 32]. "He didn't have any particular bank in mind. He left home about 10:00 A. M. , that morning. He said he went down to Mac's Bar, had a couple of beers. " "He claims that he drove to the first ---- to the Bank of America, Sunset-Echo Park Branch, parked his car, he said, in front of the bank, walked to a lady teller in about the middle of the row, and said 'give me your money'. And he said she gave him money. We asked him about simulating a gun or even simulated possession of a gun" [R. T. 32]. "He walked out of the



bank, got into his car, drove directly to the Crocker-Citizens National Bank. He again parked his car in front of the bank, walked up to the teller, and said 'give me your money' and this was his version, he said at that bank the girl said, 'are you kidding', and he said no he wasn't. So she started to give him some ones and he said not ones, twenties. This conflicts, Your Honor, but this is his version. After getting the money, he ran, got back out in his car and he said he walked out to his car, got into his car and drove to Mac's Bar at Ninth and Bonnie Brae, parked his car, went in and had a few more. He said 'I had a few more beers'. " [R. T. 33].

Agent Murphy testified that he noticed nothing unusual about the appellant during the interview [R. T. 34].

Agent James J. Deary, of the Federal Bureau of Investigation, testified as to a bank robbery on December 11, 1956, by appellant of the Connecticut National Bank, and the details of a written statement signed by the appellant admitting the robbery [R. T. 40-46].

Royal N. Perkins, also an Agent of the Federal Bureau of Investigation, testified as to an interview he had with the appellant on December 12, 1956 at the Hartford County Jail, in Hartford, Connecticut, concerning a bank robbery in Meriden, Connecticut. The written statement of the appellant was admitted without objection [R. T. 49]. Agent Perkins testified [R. T. 52], that the appellant said (concerning the Connecticut bank robbery), "I was in a hazy state of mind when I left the house at 100 Round Hill Road,

due to the amount of liquor I had consumed. I could not recall all of my activities after leaving the house. I don't recall where I parked Charles' car after arriving in downtown Meridan. I recall something red in front of me. This was possibly a red sweater worn by the teller. I don't recall entering the bank or what I may have said to the teller. I don't recall picking up any money on leaving the bank. The only thing I do recall is being in a stationery store and looking at a typewriter. The next thing I recall is being grabbed and then being taken next door to the bank." [R. T. 52, 53].

Agent Hector L. Pellegatta, of the Federal Bureau of Investigation, testified as to an interview given by the appellant on June 1, 1960, concerning the robbery of the Bank of America in Riverside, California [R. T. 67].

Dr. Carl O. Von Hagen, was called as a witness in behalf of the plaintiff in rebuttal, as a specialist in psychiatry. There was a stipulation as to his qualifications as a board certified psychiatrist. After testifying as to the present offense [R. T. 70-72], and prior offenses by the appellant, he testified as to what the appellant had told him concerning the events leading up to the present offense. Dr. Von Hagen testified that the appellant told him,

"On the day of the robberies he hadn't had anything to eat [referring to the robberies of November 11, 1964] for two days previously. He dropped by to see a friend who got him the introduction at the freight docks, she

owns a small tavern near his home. He knows he had some beer in the tavern but can't recall how much. This must have been around 11:00 in the morning. He doesn't recall leaving this or what time he left. He does recall just a fleeting glimpse of himself standing in the bank and it seems as though his environment would expand to much more than normal size and then diminish to the point where he doesn't recall what happened next. " [R. T. 72].

Dr. Von Hagen went on to testify that the appellant stated,

"The first recollection he has is sitting in the Los Angeles Police Department interrogation room, recalling raving about something to the interrogating officer. This was about 6:00 P. M. The interrogating officer read back to him a statement of what happened and asked the defendant to sign it. The defendant forgets what they told him. " [R. T. 73].

Dr. Von Hagen went on to testify that during his examination,

"From a psychiatric standpoint he was alert and cooperative, oriented, and expressed no abnormalities and showed no abnormal emotional attitude. " [R. T. 74].

Dr. Von Hagen testified that it was his opinion that the appellant was capable of assisting in his own defense, and was sane at the time of his interview [R. T. 76].

"THE COURT: Assuming all the things that the defendant told you to be true, do you have an opinion as to whether he was sane at the time of the bank robbery?

"DR. VON HAGEN: I had a sort of an uncertain opinion, Your Honor, and that was that he . . . assuming everything he said was true . . . it was possible that he could have been in a fugue state, now there are several things about this that bother me." [R. T. 76, 77].

"THE COURT: Assume that people with whom he talked shortly after the robberies on November 11, 1964, testified that he told them in some detail what had happened, how the robberies had occurred, would that change your opinion?

"DR. VON HAGEN: Yes, it would.

"THE COURT: And how would it change your opinion?

"DR. VON HAGEN: Well, I would think then that he was not in a fugue state at the time of the commission of the offense." [R. T. 78].

* * *

"THE COURT: Do you have an opinion as to whether he knew the difference between right and wrong at the time he committed the offenses on November 11, 1964?

"DR. VON HAGEN: Yes.

"THE COURT: And what is your opinion?

"DR. VON HAGEN: I believe that he was probably capable of determining right from wrong at that time.

"THE COURT: Do you have an opinion as to whether he was acting under irresistible impulse at those times?

"DR. VON HAGEN: Yes.

"THE COURT: And what is your opinion?

"DR. VON HAGEN: I don't believe he was."

[R. T. 81].

Dr. Robert Haywood Davenport, a clinical psychologist, testified in behalf of the appellant. He did not give an opinion as to the mental competence of the appellant but did present some deductions based on the psychological tests he performed on the appellant. He testified that the appellant was a "rather severely disturbed person who had difficulty keeping reality in constant focus, tended to overstep the bounds of reality as presented by the testing situations. He tended to show a great deal of anger and violence underneath what to me, on the surface appeared to be a very pleasant, quiet, soft-spoken man." [R. T. 102].

Dr. Erric Henry Marcus was called to testify in behalf of the appellant. He testified that the appellant knew the difference between right and wrong at the time he took the money from the two banks [R. T. 119].

Dr. Marcus was asked the question,

"And in your opinion, was he able to control

his will? In other words, was he able to prevent himself from mentally doing what he did at the time he did, at the time he entered the two banks and took the money?

"DR. MARCUS: No, I don't think he could."

[R. T. 120].

Mrs. Virginia Allison Ramer, the mother of the appellant and Mrs. Doretta Lorraine Ramer testified as to the unusual behavior of the appellant from childhood, up to the time of the offense in question [R. T. 105-115].

V

SUMMARY OF ARGUMENT

The specifications of error alleged by the appellant are clearly without merit or foundation.

On appeal, when considering an attack upon the sufficiency of the evidence, the Appellate Court must view the evidence at the trial in the light most favorable to the Government, together with all inferences which may be drawn therefrom.

The appellant did not make a motion for judgment of acquittal at any time during the course of the trial, therefore the question of the sufficiency of the evidence is not open on appeal.

The testimony of Dr. Von Hagen that on November 11, 1964, the date when the offenses were committed, that the appellant knew

the difference between right and wrong, and that he was not acting under an irresistible impulse if believed by the Court was sufficient evidence for the Court to find the appellant was sane at the time of the offense.

Appellant's post arrest confession to the two bank robberies of November 11, 1964 after he had been advised that he did not have to furnish any information, that any information that he did furnish could be used against him in a court of law, if he did not have an attorney a judge would appoint one for him, was admissible in evidence.

The appellant did not object to the admission of the confession of the two bank robberies, on the basis that an attorney was not present at the time of the statements, and therefore cannot raise the issue for the first time on appeal, since the admission of such evidence does not constitute plain error.

The Fifth Amendment due process clause does not require uniformity by the various Circuit Courts of Appeal in their application of the test of criminal responsibility.

What is required under the due process clause is that the Court not act arbitrarily. The Court was duty bound to apply the M'Naughten - irresistible impulse test under the doctrine of stare decisis. And finally, the appellant did not raise the issue of lack of uniformity in the test of criminal responsibility among the various Circuits in the District Court, therefore cannot raise it for the first time on appeal.

VI

ARGUMENT

I. THE DISTRICT COURT DID NOT
ERR IN HOLDING THAT THE PRO-
SECUTION HAD SUSTAINED ITS
BURDEN OF PROVING THE
APPELLANT'S SANITY.

(a) On appeal, when considering an attack upon the sufficiency of the evidence, the Appellate Court must view the evidence at the trial taken in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom.

Noto v. United States, 367 U. S. 290 (1961);

Byrne v. United States, 327 F. 2d 825

(9th Cir. 1964);

Morco v. United States, 301 F. 2d 180

(9th Cir. 1962);

Bolen v. United States, 303 F. 2d 870

(9th Cir. 1962).

(b) The appellant did not make a motion for judgment of acquittal at any time during the course of the trial [R. T. 93, 137], the question of the sufficiency of the evidence is not open on appeal.

Before the appellant can ask this Court to review the judgment of the District Court on the grounds of the sufficiency of the evidence, he must preserve this basis by appropriate motion in the trial court.

By failing to interpose his objection in the trial court, appellant has waived his right to appeal on the sufficiency of the evidence.

Hardwick v. United States, 296 F.2d 24

..... (9th Cir. 1961);

Foster v. United States, 318 F.2d 684

(9th Cir. 1963);

Castro v. United States, 323 F.2d 683

(9th Cir. 1963);

Dawkin v. United States, 324 F.2d 521

(9th Cir. 1963).

(c) The Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a miscarriage of justice.

Rule 52(b), Federal Rules of Criminal Procedure;

Bruno v. United States, 259 F.2d 8 (9th Cir. 1958);

Lucas v. United States, 325 F.2d 867

(9th Cir. 1963).

In this case there would be no injustice, since the evidence was sufficient to support a finding of guilty under the test of criminal insanity in the Ninth Circuit, M'Naughten-"irresistible impulse".

Sauer v. United States, 241 F.2d 640 (9th Cir.),

cert. den. 354 U.S. 940, 77 S.Ct. 405 (1957);

Smith v. United States, 342 F.2d 725 (9th Cir. 1965);

November 7, 1966.

Dr. Carl O. Von Hagan, a specialist in psychiatry was called by the plaintiff in rebuttal, testified as follows:

"THE COURT: Do you have an opinion as to whether he knew the difference between right and wrong at the time he committed the offenses on November 11, 1964?

"THE WITNESS: Yes.

"THE COURT: And what is your opinion?

"THE WITNESS: I believe that he was probably capable of determining right from wrong at that time.

"THE COURT: Do you have an opinion as to whether he was acting under irresistible impulse at those times?

"THE WITNESS: Yes.

"THE COURT: And what is your opinion?

"THE WITNESS: I don't believe he was." [R. T. 81].

The testimony of Dr. Von Hagen that on November 11, 1964, the date when the offenses were committed, that the appellant knew the difference between right and wrong, and that he was not acting under an irresistible impulse if believed by the Court was sufficient evidence for the Court to find that the appellant was sane at the time of the offenses.

The testimony of Mary Jane Peppard [R. T. 7, 8, 9, 10] and Mary Diane Byrne, Samuel R. Massender [R. T. 231], Mack

Johnson [R. T. 26], Emmit Murphy [R. T. 26], would indicate that the appellant was coherent, and alert in the period of time including the robbery.

Also of note was the fact that the appellant gave Agent Murphy of the Federal Bureau of Investigation a detailed statement of the procedure he used in robbing the two banks, including some of the conversation. This was the same day the robberies took place [R. T. 31-34].

In the opinion of Dr. Von Hagen, this detailed recollection by the appellant is inconsistent with a fugue state and irresistible impulse [R. T. 75].

II. THE TRIAL COURT DID NOT ERR
IN ADMITTING THE CONFESSION
OF THE APPELLANT OF THE TWO
BANK ROBBERIES OF NOVEMBER
11, 1964.

The appellant was interviewed by Agent Emmett Murphy of the Federal Bureau of Investigation on November 11, 1964 on his involvement in two bank robberies on that date. At the start of the interview he was advised by Agent Murphy, that he did not have to furnish any information, that any information that he did furnish could be used against him in a court of law [R. T. 29]. If he did not have an attorney a judge would appoint one for him [R. T. 30].

The case before the Court was tried on March 12, 1965, thus this case is controlled by pre-Miranda (Miranda v. Arizona,



384 U.S. 436 [1966]) rules of law as to the admissibility of confessions. Johnson and Cassidy v. New Jersey, 384 U.S. 719 (1966), which held that the requirements of Miranda are to apply only to cases the trial of which began after June 13, 1966.

A subject's post-arrest statements made after he has been advised of his right to remain silent and after he has been made aware of or has demonstrated that he knows that he may have the assistance of counsel at that stage, are admissible in evidence.

Payne v. United States, 340 F.2d 748, 750, 752

(9th Cir. 1965);

Dawson v. City of Los Angeles, State of California,

342 F.2d 986, 987 (9th Cir. 1965);

Latham v. Crouse, 338 F.2d 658 (10th Cir. 1964);

Otney v. United States, 340 F.2d 699, 702

(10th Cir. 1965).

No objection was made at the trial, by appellant's attorney, to the introduction of the evidence of the confession [R. T. 30-34].

If one does not object at the trial to the admission of incriminatory statements made by him to law enforcement officials during the post-arrest stage on the grounds he did not have an appointed or retained attorney present at the time of such statements, he may not for the first time raise such an issue on appeal, since such admission is not "plain error" under Rule 52(b), Federal Rules of Criminal Procedure.

Jackson v. United States, 337 F.2d 136

(D. C. Cir. 1964);



Moon v. United States, 317 F.2d 544, 545

(D. C. Cir. 1962);

Timmons v. Peyton, 240 F.Supp. 749, 759

(E. D. Virg. 1965);

United States v. Rundle, 241 F.Supp. 11, 14

(E. D. Pa. 1965).

If a defendant knowingly is aware of his right to remain silent and to have counsel, and does not request such counsel, he has waived such assistance.

United States v. Childress, 347 F.2d 448, 450

(7th Cir. 1965);

Hayes v. United States, 347 F.2d 668 (8th Cir. 1965);

United States v. Konigsberg, 336 F.2d 844

(3rd Cir. 1964);

Edwards v. Holman, 342 F.2d 679, 683

(5th Cir. 1965).

Agent Murphy testified as follows concerning the condition of the appellant at the time of his interview with appellant [R. T. 29]:

"THE COURT: What was the defendant's condition at the time you talked to him?

"THE WITNESS: He had been drinking. We talked to him about his drinking, but he was completely responsive."

The interview lasted for approximately an hour and ten minutes.

"THE COURT: Did he answer your questions?

"THE WITNESS: Yes, sir, he did.

"THE COURT: And was he coherent?

"THE WITNESS: Yes, he was."

During the interview with Murphy the appellant indicated that he would talk about the bank robberies, but first he wanted to tell his wife. He attempted to call his wife on two occasions, one for approximately twenty minutes [R. T. 31], and another time for fifteen minutes [R. T. 32]. This evidence would indicate that the appellant was in control of his faculties and capable of understanding his rights. The appellant is not a first time offender; he has a long criminal record, including two prior bank robberies, and has had exposure to all stages of federal criminal procedure [R. T. 43, 53, 64].

The testimony by Agent Murphy indicates that the appellant was aware of his rights and that he freely and voluntarily answered the agent's questions.

III. THE FIFTH AMENDMENT DUE PROCESS CLAUSE DOES NOT REQUIRE UNIFORMITY BY THE VARIOUS CIRCUIT COURTS OF APPEALS IN THEIR APPLICATION OF TEST OF CRIMINAL RESPONSIBILITY.

(a) The appellant contends that if there is not uniformity in the test applied to the determination of whether a person is criminally responsible there is a denial of due process.

Due process of law consists in the protection of the individual against arbitrary action.

National Dairy Products Co. v. Milk Control

Board of New Jersey, 44 A.2d 796 (1945).

The purpose of the due process provisions, as they relate to judicial procedure, is to insure fundamental fairness.

State v. Hedgebeth, 45 S. E. 2d 563, cert.den. ,
334 U. S. 806 (1948).

The Supreme Court of the United States in Davis v. United States, 165 U. S. 373, 378 (1897), stated that submitting instructions embodying M'Naughten-irresistible impulse to the jury was, under the circumstances of that case, "in no degree prejudicial to the rights of the defendant." The M'Naughten-irresistible impulse rule was approved by this Court in Anderson v. United States, 237 F.2d 118 (9th Cir. 1957).

In accord:

Sauer v. United States, 241 F.2d 640 (9th Cir.),
cert.den. , 354 U. S. 940, 77 S. Ct. 1405
(1957);

Smith v. United States, 342 F.2d 725 (9th Cir. 1965);

Maxwell v. United States, 9th Cir. No. 19,942

November 7, 1966.

Therefore, under no reasonable interpretation of the due process clause did the District Court in applying the M'Naughten-irresistible impulse test act in an arbitrary manner. In fact the Court was duty bound to apply that test under the doctrine of stare decisis.

In the case of Beck v. Washington, 369 U. S. 541 (1962),

the United States Supreme Court, stated:

"We have said time and again that the Fourteenth Amendment does not 'assume uniformity of judicial decisions or immunity from judicial error' "

Mr. Justice Frankfurter, in a concurring opinion in Snowden v. Hughes, 321 U.S. 1 (1944), stated:

"The Constitution does not assume uniformity of decisions or immunity from merely erroneous action, whether by the Court or the executive agencies of the state. "

McGovern v. New York, 229 U.S. 363, 370, 371
(1913).

(b) Appellant did not raise the issue of lack of uniformity in the test of criminal responsibility among the various circuits in the District Court, therefore, cannot raise it for the first time on appeal.

In the case of Gagewski v. United States, 321 F.2d 261 (8th Cir. 1963), the Court said:

"Under familiar rules we, as a reviewing court, are not required to consider or review actions of omission or commission by the trial court unless the complaining party made known to that court 'action which he desires the court to take or his objection to the action of the court and the grounds

therefor. ' "

Rule 51, Federal Rules of Criminal Procedure;

Litton v. United States, 177 F.2d 416, 418 (8th Cir.

1949), cert.den., 339 U.S. 921;

United States v. Miller, 316 F.2d 81, 83

(6th Cir. 1963);

Swift v. United States, 314 F.2d 860, 862

(10th Cir. 1963);

Grant v. United States, 291 F.2d 746, 748

(9th Cir. 1961).

VII

CONCLUSION

For the foregoing reasons, it is respectfully submitted

that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Marcus O. Tucker

MARCUS O. TUCKER

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FOR THE NINTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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SOUTHERN DIVISION

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count Indictment following a non-jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a one-count Indictment with failure of a narcotic addict and user (American citizen) to register and surrender a registration certificate upon return and entry into the United States at the port of San Diego (San Ysidro), California, in violation of Title 18, United States Code, Section 1407 [C. T. 2]. ^{1/}

Appellant entered a "not guilty" plea on September 27, 1965 [C. T. 16]. His Motion to Dismiss Indictment and Motion to Strike Portion of Indictment were denied on December 6, 1965 [C. T. 17]. Court trial commenced on December 16, 1965, before United States District Judge James M. Carter, and appellant was found guilty as charged on that date [C. T. 18].

Thereafter, on January 31, 1966, appellant was sentenced to the custody of the Attorney General for two years with eligibility for parole at any time and with a recommendation for hospital treatment for narcotics addiction [C. T. 15]. He thereafter filed a timely notice of appeal [C. T. 19].

III

ERROR SPECIFIED

• Appellant's points upon appeal may be summarized as follows:

1. That the statute and regulation in question violate the

^{1/} "C. T. " refers to the Clerk's Transcript.

Fifth Amendment prohibition against self-incrimination.

2. That the statute and regulation in question violate the Fifth Amendment due process clause by unconstitutionally restricting the right to travel.

3. That the statute and regulation in question violate the Fifth Amendment by failing to give notice.

4. That the statute and regulation in question violate the Eighth Amendment prohibition against cruel and unusual punishments.

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico at San Ysidro, California, on August 20, 1965 [R. T. 18]. ^{2/} At that time he was a citizen of the United States [R. T. 17]. He failed to register under Title 18, United States Code, Section 1407 [R. T. 19].

Appellant was examined by Dr. Paul R. Salerno on the same date [R. T. 4-5]. Dr. Salerno testified concerning his medical background and his expert qualifications in the field of examination of narcotic users and addicts [R. T. 4-5]. He testified that upon the date in question appellant had 34 recent needle marks, was under the influence of narcotics, and was a narcotics addict and user [R. T. 6-8]. He defined a "recent" needle mark as one made from

^{2/} "R. T." refers to the Reporter's Transcript of Proceedings, which is part of the record upon this appeal [C. T. Index].

about one to six or seven days prior to the examination [R. T. 8].

The Court entered a finding of fact that appellant was a user of narcotic drugs and a narcotics addict [R. T. 27].

V

ARGUMENT

A. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Appellant contends that the registration requirement of Title 18, United States Code, Section 1407, violates the Fifth Amendment privilege against self-incrimination. The courts have held otherwise.

Reyes v. United States, 258 F.2d 774, 778-82
(9th Cir. 1958);

Palma v. United States, 261 F.2d 93, 95
(5th Cir. 1958);

United States v. Eramdjian, 155 F.Supp. 914,
925-29 (S. D. Cal. 1957). 3/

3/ It should be noted that appellant makes no attack upon that portion of Section 1407 requiring prior convicted violators to register (Appellant's Opening Brief, p. 4).

It also might be noted that the question of the constitutionality of Section 1407 is before this Court in three other cases pending at the time of the preparation of this brief:

Sharon Jeanne Weissman v. United States, No. 19974;
Jimmie Merl Mason v. United States, No. 20233;
Conrad Allen v. United States District Court, No. 20948.

Appellant places his primary reliance upon the Supreme Court decision in Albertson v. Subversive Act Cont. Bd., 382 U.S. 70 (1965), which involves the application of the self-incrimination privilege to the statutory requirement of registration by Communist Party members in absence of registration by the Party itself.

However, there are three vital distinctions between Section 1407 and the legislation involved in Albertson:

1. Registration in Albertson would have practically amounted to confession of commission of a crime by every registrant, whereas registration under Section 1407 does not amount to confession of commission of any crime.
2. Registration in Albertson involved self-incrimination in connection with potential Federal prosecution, while Section 1407 registration does not have this effect.
3. No tribunal is available under Section 1407 to test a claim of the privilege, so the rule of United States v. Sullivan, 274 U.S. 259 (1927) is applicable.

(1) In Albertson, supra, registration would have involved an admission that the registrant was a member of the Communist Party (at p. 72). This comes very close to a confession of having violated Title 18, United States Code, Section 2385, which provides for fine and imprisonment of any person who knowingly "becomes or is a member of, or affiliates with", any society group, or assembly of persons who advocate the overthrow of any government in the United States.

Section 841 of Title 50, United States Code, provides in part as follows:

"The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . Therefore, the Communist Party should be outlawed." (Emphasis added).

One observer examined the Communist Party registration statutes and noted that "a person who registers his membership in an action organization practically confesses his violation of the Smith Act".

18 University of Chicago Law Review 687, 726 (1951).

A Federal Court of Appeals has stated:

"The conclusion is inescapable that the Communist Party is sui generis. The legislative array facing the Party virtually makes it a criminal conspiracy per se. Confirmation of this status is contained in a series of Supreme Court cases holding that mere association with the Communist Party presents sufficient threat of criminal prosecution to support a claim of the privilege against self-incrimination."

Communist Party of United States v. United States,

331 F.2d 807, 812 (C. A. D. C. 1963).

Consequently, it is not surprising that the Supreme Court declined to uphold the Communist Party registration requirement in Albertson, stating that "we have held that mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege." (at p. 77).

The Albertson opinion was written by Justice Brennan whose views upon the subject of the applicability of the self-incrimination privilege to the Communist Party are clearly set forth in his dissenting opinion in Communist Party v. Control Board, 367 U.S. 1, at 198-199 (1961):

"The inquiry implicit in the requirements of completing, signing and filing here is precise; it demands disclosure on matters of officership in, and knowledge of, the Communist Party. The incriminating nature of that inquiry seems plain on its face, since an admission of officership and knowledge would be not merely a possible link in the chain needed to convict under the Smith Act but would establish a main ingredient of the crime proscribed in the membership clause of the Act as this Court construes it today in Scales v. United States." (Emphasis added).

It is clear that Albertson was based upon the obvious aspect of the self-incriminatory nature of the statute in question. This Court reached a similar result in Russell v. United States, 306 F.2d 402 (9th Cir. 1962), holding that the firearm registration requirement

of 26 U.S.C.A. 5841 was unconstitutional because the registrant would necessarily admit possession, and "proof of possession establishes prima facie, a violation of that section" (at p. 411).

In the instant case appellant asserts that registration under Section 1407 might tend to incriminate him under California Health and Safety Code Section 11721; California Vehicle Code Section 23105; and California Welfare and Institutions Code Section 3100.

Under Section 11721 it is a misdemeanor to "use, or be under the influence of" narcotics, with certain exceptions. Section 23105 provides for penalties for committing the offenses of driving a vehicle while addicted to, or under the influence of, narcotic drugs. However, the questioned portion of Section 1407 does not provide for the admission of commission of any act, criminal or otherwise. It merely provides for a declaration of status, i.e., one who "is addicted to" or "uses" narcotic drugs. It is not a crime to be an addict or user of narcotic drugs in California. It is a crime to "use" narcotics in California, but a Section 1407 registrant admits no use within the state. His registration cannot provide the basis for criminal prosecution for use of narcotics, because venue in California cannot be proved. Proof of venue is essential in a California criminal prosecution.

People v. Megladdery, 40 Cal. App. 2d 748, 762-64
(1940);

People v. Parks, 44 Cal. 105 (1872).

The third statute mentioned by appellant is Section 3100 of the California Welfare and Institutions Code, providing for

commitment of narcotics addicts or potential addicts. Statutes of this type are civil in nature, not criminal.

In Re De La O, 59 Cal.2d 128 (1963),

cert. denied, 374 U.S. 856 (1963);

1 San Diego Law Review 68-69.

Also see:

Robinson v. California, 370 U.S. 660 (1962).

Consequently, there can be no self-incrimination based upon fear of "prosecution" under Section 3100, a civil statute.

If Section 1407 registration does not fail within the category of obvious self-incrimination, which was condemned in Albertson, supra, and Russell, supra, does it qualify as self-incrimination of the more subtle variation generally described as furnishing a "link in the chain of evidence needed in a prosecution . . ." ^{4/} The answer must be in the negative, because Reyes, supra, and Palma, supra, upholding the constitutionality of Section 1407, were decided in 1958, long after the "link-in-the-chain" principle was well-established in American jurisprudence by such decisions as Blau v. United States, 340 U.S. 159 (1950). Appellant provides no reason for adopting in 1966 a "link-in-the-chain" theory held inapplicable by this Court in 1958.

(2) A second vital distinction between Albertson and the instant case is the fact that Albertson involved no question of infringement upon the sovereignty of another jurisdiction. Albertson

^{4/} Blau v. United States, 340 U.S. 159, 161 (1950).

involved a Federal statute and a question of possible prosecution for commission of a Federal crime. Appellant's Section 1407 argument involves a Federal statute and alleged self-incrimination in regard to state prosecution. The rule of law proposed by appellant would have the most startling consequences. Various Federal statutes requiring the preparation of forms or other written documents might be nullified by state legislation creating criminal offenses, enabling the individual to refuse to comply with the Federal statutes upon the ground of self-incrimination under state law. Furthermore, state legislation would face the same risks, because Congress might nullify various state statutes by creating criminal offenses. The Supreme Court has held that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified" 5/ and that "the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government". 6/

Assuming arguendo that Section 1407 registration would be self-incriminatory in some cases, the solution to the problem lies not in the destruction of the statute but in providing a cloak of protection at the time that attempts are made to utilize the alleged self-incriminatory statements against the registrant, i. e., at the later state proceeding. This is the nature of the solution adopted

5/ Malloy v. Hogan, 378 U.S. 1, 11 (1964).

6/ Murphy v. Waterfront Comm'n., 378 U.S. 52, footnote 1 at p. 53 (1964).

by the Supreme Court when faced with the difficult problem of Federal-state friction in the area of the Fifth Amendment in Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964). In Murphy, witnesses refused to testify at a state hearing upon the ground that the answers might tend to incriminate them under Federal law. The Supreme Court held (at p. 79) that the witnesses would be compelled to answer the questions and that the Federal Government must be prohibited from using the "compelled testimony and its fruits" in connection with criminal prosecutions against the witnesses.

Should the same sensible approach be adopted in the instant case, a potential Section 1407 registrant would not be excused from registering, but any admissions made therein could not be used against him in criminal proceedings. No immunity statute is required:

"Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute."

(Emphasis added).

Adams v. Maryland, 347 U.S. 179, 181 (1954)

cited with approval in Murphy, supra, at 75.

By retaining Section 1407 while prohibiting the use of self-incriminatory statements (if any) in evidence, the severe problem of Federal-state encroachment upon the sovereignty of each respective jurisdiction is removed with no greater risk of self-

incrimination that may be found in the practices authorized by the Supreme Court in Murphy, supra, a case involving several concurring opinions but no dissent. The alternative suggested by appellant would permit state legislatures to nullify registration statutes passed by Congress, and vice versa.

(3) A third significant distinction between Albertson and the instant case is the fact that no tribunal is available under Section 1407 to test a claim of the privilege against self-incrimination. The Albertson opinion cites United States v. Sullivan, supra, 274 U.S. 259 (1927), in which it was held that one claiming that an income tax return called for self-incriminatory answers should raise the objection in the return but could not refuse to make any return at all (at p. 263). In a statement particularly significant in regard to the instant case, in which appellant failed to register, the Supreme Court's unanimous opinion in Sullivan stated:

"He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." (at p. 264).

Albertson distinguished Sullivan upon the basis that "first, that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and second, that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim" (at p. 79, Emphasis added).

In the instant case, as in Sullivan, there is no tribunal available to rule upon the merits of a self-incrimination claim made at the time of required registration. The registrant may not silently hear his own claim and then rule in his own favor.

Since this is not a case similar in nature to Albertson, supra, and Russell, supra, in which every registrant must practically confess, it is respectfully submitted that the general rule announced in Sullivan, supra, should be applied.

B. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT UNCONSTITUTIONALLY RESTRICT THE RIGHT TO TRAVEL.

Appellant contends that Section 1407 of Title 18 places an unconstitutional restriction upon the right to travel. This Court has held that it does not.

Reyes v. United States, supra, 258 F.2d 774, 778, 782-83 (Footnote).

" 'The right to travel is not an absolute one, free of all restraint or regulation. ' "

Reyes, supra, footnote at p. 783, quoting

United States v. Eramdjian, supra, at 929.

C. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT VIOLATE THE FIFTH AMENDMENT BY FAILURE TO GIVE NOTICE.

Appellant contends that Section 1407 is unconstitutionally vague in regard to the terms "addicted" and "uses". This argument was rejected in Palma v. United States, supra, 261 F.2d 93 (5th Cir. 1958), where the appellant unsuccessfully argued that Section 1407 and the regulations pursuant thereto "fail to define a proper standard of guilt by being vague and indefinite . . ." (footnote at pp. 94-95). The appellant's brief in Palma reveals that the question of alleged vagueness of the addict and user terms was raised in that appeal. ^{7/}

In regard to the term "addicted", as used in Section 1407, the constitutionality of that term was settled by this Court's decision in Reyes v. United States, supra, 258 F.2d 774, 778 (9th Cir. 1958), affirming United States v. Eramdjian, supra, 155 F. Supp. 914 (S. D. Cal. 1957). The latter decision held that the "addicted" term was sufficiently definite (at pp. 919, 930-31).

Furthermore, appellant raised no question in the trial court regarding the term "addicted". In fact, his counsel stated that Dr. Salerno's definition of the term was "probably a sound definition" [R. T. 24]. An issue must be raised in a timely fashion in the trial

^{7/} It is a proper practice to refer to appellate briefs in order to determine whether a particular question was raised upon appeal, e. g., Murphy v. Waterfront Comm'n., supra, 378 U. S. 52, 65-66; Karrell v. United States, 247 F.2d 706, 709-10 (9th Cir. 1957)

court.

Ramirez v. United States, 294 F.2d 277, 283

(9th Cir. 1961).

The remaining term in question is "uses". This term compares favorably with other words and phrases which have been upheld by the United States Supreme Court when attacked upon the ground of unconstitutional vagueness:

1. Prohibition of building fires in or "near" inflammable material. 8/

2. "Obscene, lewd, lascivious, filthy, indecent, or disgusting." 9/

3. "Moral turpitude." 10/

4. "Reasonable allowance for salaries" (income tax prosecution). 11/

5. "orthodox Hebrew religious requirements" (criminal case). 12/

6. "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" (found to be sufficiently definite for the facts of the case then before the

8/ United States v. Alford, 274 U. S. 264 (1927).

9/ Winters v. New York, 333 U. S. 507, 518 (1948).

10/ Jordan v. DeGeorge, 341 U. S. 223 (1951).

11/ United States v. Ragen, 314 U. S. 513, 523 (1942).

12/ Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925).

Court). 13/

7. "to do all in one's power. " 14/
8. "unreasonable waste of natural gas. " 15/
9. Contribution for any "political" purpose. 16/
10. "offensive" words to another. 17/
11. Acts which "tend to accomplish" certain results. 18/
12. "connected with or related to the national defense. " 19/
13. "psychopathic personality. " 20/

It is possible, of course, to conjure hypothetical factual situations in which the "uses" term might be subject to a question of definition. This may be true of most criminal statutes. Interpretation of statutes is one of the functions of an appellate court, but it is not a common practice to declare statutes to be void because they may need interpretation under unusual circumstances. As an example, the state burglary statutes may have been considered ambiguous when originally enacted, due to questions regarding

13/ Williams v. United States, 341 U. S. 97 (1951).

14/ Miller v. Strahl, 239 U. S. 426 (1915).

15/ Bandini Co. v. Superior Court, 284 U. S. 8 (1931).

16/ United States v. Wurzbach, 280 U. S. 396 (1930).

17/ Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

18/ Waters-Pierce Oil Co. v. Texas, 212 U. S. 86 (1909).

19/ Gorin v. United States, 312 U. S. 19 (1941).

20/ Minnesota v. Probate Court, 309 U. S. 270 (1940).

the nature of an "entry" (extending an arm through an open window?), an "inhabited building" (tenants away visiting Europe), and "night-time" (half hour after sunset?). The courts have solved the problem by defining the terms rather than striking down the burglary statutes. The same could be said of dozens of other well-established criminal statutes.

In Scales v. United States, 367 U. S. 203 (1961), the appellant, convicted of being a member of an organization advocating the overthrow of the Government of the United States by force or violence, contended that the term "member", was excessively vague, because it did not distinguish between "active" members and "nominal" members. The Supreme Court rejected this argument and held that clarification of the term could be accomplished by instructions to the jury:

"Nor do we think that the objection on the score of vagueness is a tenable one. The distinction between 'active' and 'nominal' membership is well understood in common parlance [citing authorities], and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case." (at p. 223, Emphasis added).

The Court added that it made no difference in that particular case, as the appellant was clearly an active member.

In the instant case, as in Scales, any ambiguity in the meaning of the term "uses", would not go "to the sufficiency of the statute. . . ". Appellee does not concede, however, that the term "uses" is vague. Appellant cites no authority upon the question to support his attempt to accomplish the overruling of the decision in Palma, supra.

The Supreme Court has held:

"We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. United States v. Petrillo, 332 U.S. 1 (1947)."

Jordan v. DeGeorge, 341 U.S. 223, 231 (1951).

This Court has held:

"The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal defense."

Turf Center, Inc. v. United States, 325 F.2d 793,
795 (9th Cir. 1963).

D. ASSUMING ARGUENDO THAT THE
 "USES" PORTION OF TITLE 18,
 UNITED STATES CODE, SECTION
 1407 IS UNCONSTITUTIONAL, AP-
 PELLANT HAS NO STANDING TO
 OBJECT.

Even if it be conceded, for purposes of argument only, that the "uses" portion of Section 1407 is unconstitutionally vague, appellant has no standing to object. He was convicted of being an addict and a user who failed to register. If the "uses" portion is stricken as void surplusage, appellant still stands convicted of failure to register as an addict. The Court found as a finding of fact that appellant was a narcotic addict as well as a narcotic user [R. T. 27].

There is an additional reason for reaching the conclusion that appellant has no standing to object.

"A litigant can be heard to question the constitutionality of a statute only when and insofar as he at least claims to be damaged by its operation."

Atherton v. United States, 176 F.2d 835, 841

(9th Cir. 1949), citing Alabama State Federa-
tion of Labor v. McAdory, 325 U.S. 450 (1945).

In Williams v. United States, supra, 341 U.S. 97, 101 (1951), and in Scales v. United States, supra, 367 U.S. 203, 223 (1961), the Supreme Court stated that it did not matter that a criminal statute was unconstitutionally vague as to some people, so long as the defendant in question clearly fell within the scope of the

terminology alleged to be vague. For example, in Williams the Court would not decide whether the broad language of the statute, prohibiting a violation of another's constitutional rights, was excessively vague, because the defendant's conduct in beating and pounding prisoners until they confessed obviously deprived the prisoners of their constitutional rights.

In the instant case appellant obviously was a user of narcotics, considering the testimony most favorably to the prevailing party, so it is immaterial that he may claim that the "uses" portion of the statute is vague as to someone else. He had 34 recent needle marks and was addicted and under the influence of narcotics (R. T. 6-8).

Assuming arguendo that the "uses" portion of Section 1407 is vague, it is respectfully submitted that there is no reason not to follow the Supreme Court approach to this type of problem as exemplified by the decisions in Williams, supra, and Scales, supra.

E. TITLE 18, UNITED STATES CODE, SECTION 1407, DOES NOT INVOLVE CRUEL AND UNUSUAL PUNISHMENT.

Appellant argues that the registration requirement of Section 1407 involves cruel and unusual punishment, citing Robinson v. California, supra, 370 U.S. 660 (1962).

Robinson held that subjecting a narcotics addict to criminal punishment merely because he was addicted constituted cruel and unusual punishment. To do so would amount to punishing one for

being ill.

Robinson did not hold that narcotics addicts are free from all controls. On the contrary, the decision recognized that "a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures." (at p. 665, emphasis added).

Needless to say, if the inconvenience of going behind bars for compulsory treatment does not constitute cruel and unusual punishment, the Section 1407 requirement of filling a few blanks upon a piece of paper can hardly be described as "cruel" or "punishment".

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO

No. 20,890

In the

United States Court of Appeals

For the Ninth Circuit

ELMER L. FARIS and ELAINE V. FARIS,
Appellants,

vs.

A. G. MADDOX, Commissioner of Revenue
and Taxation, and GOVERNMENT OF GUAM,
Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the District Court of Guam

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APPELLANTS' OPENING BRIEF

On Appeal from the District Court of Guam

INTRODUCTION

This appeal involves questions arising under the Guam Territorial income tax law (48 U.S.C.A. § 1421i, being a portion of the Organic Act of Guam, 64 Stat. 384 (1950), as amended). All references herein to sections of the Internal Revenue Code of 1954, as amended, will be dual references to both the Guam and United States income tax laws. Citations of regulations, unless specified to be of Guam origin, will be to regulations issued under the United States income tax laws.

“R” followed by a number will refer to a page in the printed Transcript of Record before this Court.

OPINION BELOW

The opinion of the District Court of Guam is not officially reported. The decision and opinion are contained in the memorandum opinion, appearing at R. 46.

JURISDICTION

This appeal is from a judgment adverse to appellants and taxpayers in an action filed in the District Court of Guam on September 30, 1965. In appellants' first count, appellants sought a redetermination of a deficiency assessment for the tax year ended December 31, 1961.

In the second count, appellants sought a refund of income taxes for the years ended December 31, 1960 and 1961.

The District Court of Guam has jurisdiction of the cause of action seeking redetermination of income taxes under § 19700 of the Government Code of Guam and 48 U.S.C.A. § 1424(a). The District Court of Guam has jurisdiction over the cause of action for a claim for refund of taxes alleged to be overpaid by virtue of the provisions of 48 U.S.C.A. § 1421i(h)(2). On February 14, 1966, appellants filed a notice of appeal in the District Court of Guam over the judgment filed herein on January 21, 1966, R. 17-18. Jurisdiction is conferred on this Court by 28 U.S.C.A. §§ 41, 1291 and 1294.

QUESTIONS INVOLVED

1. Is a wage earner who is a resident of California but derives salary for personal services rendered to a Guam corporation outside Guam to be taxed under the Guam income tax laws as a nonresident alien?

2. Assuming the foregoing question is answered in the affirmative, is his salary, to the extent it represents services performed outside of Guam, deemed income derived from

sources within Guam and, hence, in its entirety gross income taxable by the Government of Guam?

3. Upon the facts herein, is appellant entitled to allocate income received from a Guam corporation on a prorata basis; i.e., period of Guam service to the period of non-Guam service?

CODE SECTIONS, STATUTES, AND REGULATIONS INVOLVED

To the extent involved herein, all provisions of the Internal Revenue Code, the Organic Act of Guam, and pertinent United States regulations are set forth in Appendix A.

STATEMENT OF FACTS

Appellant Elmer L. Faris and his wife Elaine V. Faris were residents of California during the years 1960 and 1961, the periods of time in question. Mrs. Faris is a party because the original returns and claims for refunds filed herein for these periods of time were filed jointly and her name appeared thereon as a joint taxpayer. Her pertinency to the issues on appeal are limited to the foregoing statement. All singular references will be to the appellant Elmer L. Faris.

Appellant, prior to 1960, was engaged in the electrical contracting business in California. Prior to March 1958 appellant's electrical contracting company (Accurate Electric Company, Inc., a corporation) obtained a subcontract with Empire Gas and Engineering Company of Miami, Florida, to do certain electrical installation work on Guam. R. 38. In connection with the performance of that contract, appellant formed a Guam corporation called Accurate Electric Company (Guam), Inc. to which the electrical subcontract referred to above was assigned. Subsequent to the formation of the Guam corporation, the Guam corporation

engaged in the electrical contracting business on Guam generally as is borne out by the corporate Guam income tax returns for the years in question, R. 24 and schedule of jobs attached thereto at R. 29, and R. 31, and schedule of jobs attached thereto at R. 34.

During the two years in question, appellant performed services for the Guam corporation as general manager of its activities, including appraising, making bids, purchasing supplies, and the other aspects of a general electrical contracting business. (Deposition of Appellant, pp. 4-5.) For his services for 1960, he was paid \$18,000.00 by the Guam corporation and filed a joint return and paid a tax thereon itemizing various deductions, including contributions, interest, and taxes. R. 20-21. For the year 1961, appellant was paid a total salary of \$15,000.00 and also claimed certain deductions and exemptions as in the previous year. R. 22-23. At no time during these proceedings or otherwise have the salaries paid to appellant been questioned by appellees as excessive.

The 1961 deficiency, R. 43-45, arose as a result of a re-determination by appellee Commissioner that so far as Guam was concerned, appellant had a Guam tax status as a nonresident alien. Appellee Commissioner thereupon recomputed the tax for said year and asserted a resulting deficiency. In recomputing appellant's income, he allowed only one exemption, disallowed joint filing, and determined the tax on the full amount of \$14,400.00, being the annual salary for that year, less \$600.00. No allocation or proration of gross income and deductions was made in this recomputation. No deficiency was asserted for the year 1960, apparently because the statute of limitations barred it.

As to the claims for refunds for 1960 and 1961, appellant sought refunds of the total amounts paid on the basis that none of the income was taxable to Guam because appellant

spent negligible time in Guam and performed substantially all of the services for the Guam corporation in California. As an alternate ground, refund was also sought on the basis that if he was taxable as a nonresident alien, the gross income should have been allocated or prorated, based upon the amount of time spent in Guam.

The lower court disregarded the separate legal entity of the Guam corporation and appellant as a salaried officer and employee thereof, and further sustained the contention of appellees that appellant was properly taxable by appellees as a nonresident alien.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court of Guam erred in finding that appellants controlled the Guam corporation on an alter ego basis and in thereby disregarding the existing separate legal entities.

2. The District Court of Guam erred in finding that any part of the salary in question paid to appellant was income from sources within Guam.

3. If a portion of said salary is income from sources within Guam, then the District Court of Guam erred in failing to allocate said income as to its source and determine taxable Guam income on the basis of such allocation.

SUMMARY OF ARGUMENT

There is no evidence to support the finding and determination by the trial court that the legal entity of the Guam corporation which paid appellant's salary should be disregarded. The only reason advanced by the trial court for disregarding the corporate nature of appellant's Guam business was that salaries paid to nonresident employees and officers would be able to escape the payment of Guam

taxes. This contention was never raised by appellees either before or after this action was instituted in Guam. There is no evidence in the record to sustain the finding that there was no business purpose existing for the formation and continuation of the Guam corporation or that such formation and operation was a mere sham or subterfuge.

Under 48 U.S.C.A. § 1421i(e), § 31, Organic Act of Guam, as amended by 72 Stat. 681 (1958), being designated the Guam Territorial income tax, "Guam" is ordinarily substituted for "United States" in the Internal Revenue Code of 1954, as amended. § 862 of said Internal Revenue Code provides that compensation for labor or personal services performed without the United States (Guam) constitutes gross income from sources without the United States (Guam). Under the Guam Territorial income tax law, appellant's salary was paid for services rendered outside of Guam with the exception of two ten-day trips, one in 1960 and one in 1961, constituting approximately 10% of the total services rendered to the Guam operation, and as such the entire amount of the salary should be excluded from Guam taxable income. If such income is deemed income partly from within Guam pursuant to the provisions of § 863(b) of said Internal Revenue Code, then the same should have been allocated as provided therein on the basis of length of service rendered in Guam to length of service rendered outside Guam.

ARGUMENT

I. There Is No Evidence Before the Trial Court to Sustain Its Finding That the Guam Corporation Should Be Disregarded as a Separate Legal Entity for Guam Income Tax Purposes.

Rule 52(a) of the Federal Rules of Civil Procedure permits a finding of fact to be set aside on appeal if the same is clearly erroneous. The finding with regard to the alter ego status of the Guam corporation substantially wholly

owned by appellants is unsupported by any evidence, testimony or documentary. In fact, at no time during the proceedings, as well as the administrative proceedings prior to the institution of this action in the District Court of Guam, did appellees assert or contend that in computing appellants' taxes, the corporate structure should be disregarded. On the contrary, at all times appellees have recognized the validity of the corporate structure and collected corporate income taxes as may be seen from the record herein (R. 24 and R. 31, being the corporate income tax returns for the years in question).

Furthermore, where findings are based upon uncontradicted testimony, documentary evidence, or evidence by depositions, or by any combination of them, it has been held that findings of fact based thereon are subject to free review on appeal unaffected by the presumptions which ordinarily tend to uphold findings on controverted issues. *Carter Oil Co. v. McQuigg* (7th Cir., 1940), 112 F.2d 275.

The separate entity of a corporation can be disregarded in income tax situations but only when warranted by exceptional circumstances. In *Commissioner of Internal Revenue v. Eldridge* (9th Cir., 1935), 79 F.2d 629, 102 ALR 500, the Commissioner disregarded the separate entity of a corporation wholly owned by taxpayers and disallowed deductions for losses on sales of securities to taxpayers' wholly-owned corporation. The Court of Appeals held for the taxpayers and refused to disregard the corporate entity. The Board of Tax Appeals had earlier reversed the Commissioner and held that the taxpayers were entitled to the deduction and, in so doing, held that the corporation was an entity separate and distinct from the taxpayers. This holding was affirmed and the Court stated in its opinion, in part, as follows:

"The correctness of this holding (the corporation was an entity separate and distinct from the tax-

payers) is challenged by the Commissioner, his contention being that the separate entity of the corporation should be disregarded, and the corporation and its stockholders treated as one.

"This is sometimes done in tax cases (citing cases), but only when warranted by exceptional circumstances. Generally, in tax cases, as in other cases, a corporation and its stockholders are to be treated as separate entities. (Citing cases.)

"The facts found by the Board of Tax Appeals in this case do not, in our opinion, warrant us in disregarding the separate entity of the corporation. The fact that respondents owned all its stock and were in complete control of it is no reason for disregarding its separate entity. (Citing cases.)

"It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability. (Citing cases.)"

Since neither the answer to the complaint (R. 6) filed by the appellees herein, nor the pretrial order (R. 9) made by the trial court, raised any issue of disregard of corporate entity, there is understandably no attempt by either side to meet this issue. However, an examination of the corporate tax returns shows that the corporation reported gross income for the tax year ended February 29, 1960, of \$226,914.67; had a beginning inventory of \$315,663.40; paid truck license fees in the amount of \$569.82; paid a Vice-President compensation of \$2,000.00; and in general, was actively engaged in the electrical contracting business in Guam (R. 24-30). The corporate tax return for the year ended February 28, 1961, indicates comparable business activity. Appellants contend, on the other hand, that the

record is totally devoid of evidence to indicate the corporation was merely a sham or subterfuge.

Finally, the trial court's finding on this issue and its obvious reliance thereon in its conclusions of law is unsupported by the judgment which was entered herein (R. 50). If the lower court were justified in its findings ignoring the corporate status of appellant's Guam corporation, then it should have redetermined the tax liability on the basis that the entity was a partnership or sole proprietorship and recomputed the tax liability accordingly. This was neither suggested by the trial court nor by the appellees.

II. The Court Below Erred in Holding That Appellant's Tax Status with the Government of Guam Is That of a Nonresident Alien.

The Internal Revenue Code of 1954, as amended, Subpart A of Part II (§§ 871-877), provides for a tax on nonresident aliens, with certain exceptions, of an amount equal to 30% of the gross taxable income derived from sources within the United States. Generally, the alien is only allowed a single exemption of \$600.00; must itemize his deductions, which must be allocated to United States sources; and is not permitted to file a joint return. Under certain circumstances, this general scheme of taxation can be altered by tax treaties or conventions. § 894 I.R.C.

48 U.S.C.A. § 1421i(e), being a part of the Guam income tax law, requires substitutions of terms when the Internal Revenue Code is applied to Guam. Since there is nothing specific in either the Organic Act of Guam or any other statute applicable to Guam regarding the taxation of non-residents of Guam, one must endeavor to ascertain the intent of Congress from a logical approach. The reports of Congress shed no light on this problem. Senate Report No. 2109, 81st Cong., 2nd Sess., 1950, and Senate Report No.

2176, 85th Cong., 2nd Sess., 1958. This logic may well be applied to the results of appellees' contentions as upheld by the trial court.

The principal reason for appellants urging here that a California resident and United States citizen is not an alien for purposes of the Guam income tax law is that the otherwise combined Guam, federal and California tax burden on the salary income derived from the Guam business would substantially exceed the applicable income tax rate either under the laws of Guam or the United States, together with applicable local income tax laws. It would seem plain that Congress did not intend nor want the Guam tax laws to be interpreted to reach this result.

The applicability of a state and federal tax credit (See § 901, I.R.C. and § 18001, Revenue and Taxation Code, State of California) is not an answer to double taxation as suggested by the trial court below in its memorandum opinion, R. 46 at 47-48, since in both instances the federal government, as well as the State of California, applies a limitation on the credit. § 904, I.R.C., provides that the credit shall not exceed the same proportion of the tax against which said credit is taken which the taxpayer's taxable income from sources within such country (or possession) but not in excess of the taxpayer's entire taxable income bears to his entire taxable income for the same taxable year. California's limitation is similar.

In summation, appellants' dilemma here lies in the fact that because of the existence of limitations on tax credits, they and others all similarly situated are in the position of paying greater total taxes on given income than they would be had this income been earned in or derived from a source other than Guam.

This result is attributed directly to the interpretation that a nonresident of Guam is to be taxed by the Government of Guam as an alien.

Under the mirror reading principal of § 31 of the Guam Organic Act (48 U.S.C.A. § 1421i(e)), there is no direction given as to the interchange of the word "alien". However, traditionally the term "alien" has to do with possession or lack of United States citizenship. It has no logical or ordinary application to the status of individuals vis-a-vis the territory of Guam. Hence, appellants contend that under 48 U.S.C.A. § 1421i(e) which permits the omission of inapplicable language, where necessary to effect the intent of the section, the appellees should (and can) tax only aliens (i.e. non-United States citizens) as aliens.

Nowhere in the Organic Act of Guam does the Congress speak or hint of a status of Guamanian citizens as distinguished from United States citizens. As a matter of fact, 48 U.S.C.A. § 1421i provides for the granting of United States citizenship to certain persons born in Guam and it appears clear that persons not becoming citizens by virtue hereof remain United States nationals or citizens of a country other than the United States.

As of the date of writing this brief, there is before this Court, having been submitted after oral argument, the case of *Atkins, Kroll (Guam), Ltd. v. Government of Guam*, No. 19,915, wherein a parallel question concerning the Guam income tax has been raised. In that case, the Government of Guam levied a withholding tax on dividends paid by a Guam corporation to its parent, a California corporation, at the 30% rate, under § 881 of the Internal Revenue Code, on the grounds as to Guam the California corporation is a foreign or alien corporation. The same reasons urged there for setting aside the Guam interpretation is urged here,

to-wit: the interpretation is not consistent with Congressional intent not to tax off-island taxpayers in a discriminatory and unfair manner. Appellants do not, by institution of this action, seek to gain a tax position of paying less total taxes by virtue of Guam operations, but merely to attain the same tax liability on all income taxes, Guam, federal and California, that they would have if this income were wholly earned within the United States. The Guam position with regard to appellant's tax status is rendered more onerous when one considers that the Guam tax rates are the same as the federal rates and that the state and federal tax credits are often partial ones.

III. Under the Internal Revenue Code of 1954, Compensation for Personal Services Rendered Outside the United States Is Not Considered Income Derived from Sources Within the United States and, Therefore, Not Taxable Income.

Applying the so-called "mirror-reading" principle as enunciated by 48 U.S.C.A. § 1421i(e), § 31, the Organic Act of Guam, as amended, it seems further abundantly clear that compensation paid to a nonresident employee by a Guam taxpayer for services rendered outside Guam is not Guam taxable income.

Appellant Elmer L. Faris testified in his deposition that during the years in question he was engaged full time in the electrical contracting business and that of this time, 40% was devoted to the Guam operation. He further testified that he spent less than ten days in Guam in 1960 and a like amount in 1961. (Deposition of appellant, p. 5.) Based on an average of 260 working days per year, 40% would amount to approximately 104 days devoted to the Guam business, of which ten days were spent physically present in Guam. On this basis, it can easily be computed that approximately 10% of the salary earned during each of the years was paid for services rendered by appellant while physically present in Guam.

On the basis of this evidence, the court would have been justified in finding that the income earned by appellant herein was income partly from within and partly from without Guam, as the same is defined in § 863(b) of the Internal Revenue Code of 1954, as amended. This section requires an apportionment under a process or formula of general apportionment prescribed by the Secretary or his delegate. Under the Guam income tax law, the Governor of Guam is empowered to make needful and interpretive rules and regulations (48 U.S.C.A. § 1421i(d)(2)). Regulation § 1.861-4(b) provides in part as follows:

“If no accurate allocation or segregation of compensation for labor or personal services performed in the United States can be made, or when such labor or service is performed partly within and partly without the United States, the amount to be included in the gross income shall be determined by an apportionment on the time basis; that is, there shall be included in the gross income an amount which bears the same relation to the total compensation as the number of days of performance of the labor or services within the United States bears to the total number of days of performance of labor or services for which the payment is made.”

No comparable regulation under § 863(b) of the Guam Territorial income tax law has been promulgated by the Governor of Guam. However, in the absence of such a regulation, it would seem reasonable to conclude that where the precise problem presents itself to the District Court of Guam, and in the absence of any reason not to apply the same, such method or basis of apportionment pursuant to the plain statutory language would be indicated. The trial court below, however, rejected the contentions of appellants that there should be apportionment and concluded, in

essence, that to rule in any other fashion than the manner in which it did would deprive the Government of Guam of valuable taxes.

While the motivation of securing the payment of all just and legal taxes to the Government of Guam is laudable, in the absence of statutory authority for the collection of taxes, the motivation is unsupportable.

CONCLUSION

There is no evidence to sustain a finding by the District Court of Guam that the Guam corporation, through and by which appellant conducted an electrical contracting business in Guam, was a mere sham and subterfuge. Since appellants are United States citizens, they should not be taxed under the Guam income tax law at the same rate that the United States Government taxes aliens who are not residents of the United States. Salary paid to appellant as salary for services rendered to the Guam corporation outside of Guam is not income derived from sources within Guam and hence not taxable to a nonresident thereof. There is no express or implied intention of Congress to authorize the Government of Guam to impose a different rate of tax on nonresidents than residents. In fact, the reasonable and fair implication of the intent of Congress is to treat all taxpayers of Guam who are United States citizens equally and fairly. If the salary paid to appellant for services rendered while physically present in Guam should be deemed income derived from sources within Guam, then an allocation of income should be made on the basis of time spent in Guam to time spent outside Guam.

It is, therefore, respectfully urged that this Court should reverse the decision of the District Court of Guam and direct that judgment be entered in favor of appellants in

the court below on all counts. If this Court is of the view that the salary should be allocated, then it is respectfully urged that the decision be reversed and remanded for further proceedings in accordance with the opinion and decision of this Court.

Dated: August 12, 1966.

Respectfully submitted,

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Of Counsel

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER S. FERENZ

(Appendix Follows)



Appendix

STATUTES AND CODE SECTIONS

Organic Act of Guam

§ 1421i. Income tax.

(a) Applicability of Federal laws.

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(b) Guam Territorial income tax.

The income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) Enforcement of tax.

The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) Definition of "income-tax laws"; administration and enforcement; rules and regulations.

(1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible

with the intent of this section: Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) Substitution of terms.

In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate"

for "Secretary or his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

* * * * *

(h) Jurisdiction of District Court; suits for recovery or collection of taxes; payment of judgment.

(1) Notwithstanding any provision of section 1424 of this title or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district courts with respect to the United States income tax. When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.

* * * * *

§ 1421i. Citizens by birth in Guam on and after April 11, 1899.

(a) The following persons, and their children born after April 11, 1899, are declared to be citizens of the United States, if they are residing on August 1, 1950 on the island of Guam or other territory over which the United States exercises rights of sovereignty:

(1) All inhabitants of the island of Guam on April 11, 1899, including those temporarily absent from the island on that date, who were Spanish subjects, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality.

(2) All persons born in the island of Guam who resided in Guam on April 11, 1899, including those temporarily absent from the island on that date, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality.

(b) All persons born in the island of Guam on or after April 11, 1899 (whether before or after August 1, 1950) subject to the jurisdiction of the United States, are declared to be citizens of the United States; Provided, That in the case of any person born before August 1, 1950, he has taken no affirmative steps to preserve or acquire foreign nationality.

(c) Any person hereinbefore described who is a citizen or national of a country other than the United States and desires to retain his present political status shall make, within two years of August 1, 1950, a declaration under oath of such desire, said declaration to be in form and

executed in the manner prescribed by regulations. From and after the making of such a declaration any such person shall be held not to be a national of the United States by virtue of this chapter.

(d) The Commissioner of Immigration and Naturalization, with the approval of the Attorney General, is authorized and empowered to make and prescribe such rules and regulations not in conflict with this chapter as he may deem necessary and proper.

(e) Section 804(c) of Title 8 shall not apply to persons who acquired citizenship under this section. Aug. 1, 1950, c. 512, § 4(a), 64 Stat. 384.

Internal Revenue Code of 1954

§ 862. Income from sources without the United States.

(a) Gross income from sources without United States.—The following items of gross income shall be treated as income from sources without the United States:

(1) interest other than that derived from sources within the United States as provided in section 861(a)(1);

(2) dividends other than those derived from sources within the United States as provided in section 861(a)(2);

(3) compensation for labor or personal services performed without the United States;

(4) rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like properties;

(5) gains, profits, and income from the sale of real property located without the United States; and

(6) gains, profits, and income derived from the purchase of personal property within the United States and its sale without the United States.

(b) Taxable income from sources without United States.—From the items of gross income specified in subsection (a) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be treated in full as taxable income from sources without the United States.

§ 863. Items not specified in section 861 or 862.

* * * * *

(b) Income partly from within and partly from without the United States.—In the case of gross income derived from sources partly within and partly without the United States, the taxable income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the United States may be determined by processes or formulas of general apportionment prescribed by the Secretary or his delegate. Gains, profits and income—

(1) from transportation or other services rendered partly within and partly without the United States,

(2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, or

(3) derived from the purchase of personal property within a possession of the United States and its sale within the United States,

shall be treated as derived partly from sources within and partly from sources without the United States.

Sec. 901. Taxes of Foreign Countries and of Possessions of United States.

(a) ALLOWANCE OF CREDIT.—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the applicable limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under sections 902 and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year. The credit shall not be allowed against the tax imposed by section 531 (relating to the tax on accumulated earnings), against the additional tax imposed for the taxable years under section 1333 (relating to war loss recoveries), or against the personal holding company tax imposed by section 541.

(b) AMOUNT ALLOWED.—Subject to the applicable limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) CITIZENS AND DOMESTIC CORPORATIONS.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * * *

Sec. 904. Limitation on Credit.**(a) ALTERNATIVE LIMITATIONS.—**

(1) **PER-COUNTRY LIMITATION.**—In the case of any taxpayer who does not elect the limitation provided by paragraph (2), the amount of the credit in respect of the tax paid or accrued to any foreign country or possession of the United States shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources within such country or possession (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

(2) **OVERALL LIMITATION.**—In the case of any taxpayer who elects the limitation provided by this paragraph, the total amount of the credit in respect of taxes paid or accrued to all foreign countries and possessions of the United States shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

* * * * *

Treasury Regulations**§ 1.861-4 Compensation for labor or personal services.**

* * * * *

(b) Amount includible in gross income. If a specific amount is paid for labor or personal services performed in the United States, that amount (if income from sources within the United States) shall be included in the gross income. If no accurate allocation or segregation of compensation for labor or personal services performed in the United States can be made, or when such labor or service

is performed partly within and partly without the United States, the amount to be included in the gross income shall be determined by an apportionment on the time basis; that is, there shall be included in the gross income an amount which bears the same relation to the total compensation as the number of days of performance of the labor or services within the United States bears to the total number of days of performance of labor or services for which the payment is made.

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NO. 20,893 ✓

*See Vol.
3380*

United States Court of Appeals
NINTH CIRCUIT

MICHELE MARCHESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JESSE DEL BONO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

FILED

JUN 13 1967

WILLIAM B. LUCK, CLERK

Appeal from the United States District Court
for the Central District of California.

PETITION FOR REHEARING

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12 1967

JUN 13 1967

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELE MARCHESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JESSE DEL BONO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Central District of California.

PETITION FOR REHEARING

Appellants Michele Marchese and Jesse Del Bono petition the Court for a rehearing of its decision of May 25, 1967, and pursuant to Rule 23 of this Court, appellants respectfully suggest that the rehearing be *en banc*. Said petitions and suggestion are made on the following grounds:

I. THIS COURT, FOR THE FIRST TIME PASSING UPON THE QUESTION OF THE USE OF THE ELECTRONIC TRANSMITTING DEVICE, ERRONEOUSLY HELD THAT THE USE OF SUCH DEVICE WAS PERMISSIBLE.

The Court based its decision on the case of *Osborn v. United States*, 385 U.S. 323, which was clearly inapposite and distinguishable from the instant case. In *Osborn* no transmitting device was used. Instead, there was concealed on a police officer, under the prior authorization and supervision of judges of the United States District Court, a hidden recorder. The tape and the transcription of the conversation so recorded between the officer and the defendant were used to corroborate the officer's testimony in the trial of the defendant for bribery, and as the Court stated, the recording "provided strong corroboration of the truth of the charge against petitioner" and:

"The issue here, therefore, is not the permissibility of 'indiscriminate use of such devices in law enforcement' but the permissibility of using such device under the most precise and discriminate circumstances, . . . We deal here not with surreptitious surveillance of a private conversation by an outsider (cf. *Silverman v. United States*, 385 U.S. 505) but, as in *Lopez v. United States*, 373 U.S. 427, with the use by one party to make an accurate record of a conversation about which that party later testified."

The Court particularly pointed out the authorization and strict supervision of the judges and that the use of the recorder was necessary to protect the integrity of their court, which was being undermined.

In the instant case, Sussman, a narcotic addict, a false friend of Marchese, a stool pidgeon, referred to by the Government as a special employee, was equipped when he entered Marchese's apartment, not with a tape recorder as were the officers in *Lopez* and *Osborn*, but, with a transmitting device. At first he testified that he was told that the transmitter had a recording mechanism which would record what he was

saying, that they would take it down later and he would sign it after he heard it. Later, after noon recess, he changed his testimony and said there was no recording on tape. If no recording on tape was made and the officers denied that there was and that they made notes of such portions of the conversation which they could hear, then the *Osborn* case is clearly inapposite. Moreover, both in *Lopez* and *Osborn*, the conversations were with officers and the defendants could reasonably assume that what they said might be used against them. This, in itself, distinguishes the instant case.

This Court completely overlooked the implication of *Lopez*, where the decision was based on a distinction considered to exist by the majority of the Supreme Court Justices between the use of a tape recorder and a transmitting device. As pointed out in the concurring opinion of Justice Warren and the dissenting opinions, the use of a hidden electronic transmitting device, permitted in *On Lee v. United States*, 343 U.S. 747, was now forbidden. The Courts in the cases of *Hadju v. United States*, 189 F. 2d 230 (Fla), and *United States v. Stone*, 232 F. Supp. 296, expressed the same views as to the interpretation of the *Lopez* case as we do; that while a tape from a recording device may be used for corroboration purposes only, the use of the transmitter was a violation of the rights of the Fourth Amendment. This Court made no mention in its opinion either of the *Lopez* case or the aforesaid cases, but made its holding on an erroneous interpretation of *Osborn*.

II. THE COURT ERRONEOUSLY STATED THAT JUDGE CLARKE DENIED THE MOTIONS OF APPELLANTS.

This view was based on a misreading of Judge Clarke's order. He denied the motion to file Amended Findings, Conclusions and Judgment *without prejudice pending further clarification* by the Circuit Court of its opinion, and certified the matter for further clarification.

He did not deny the motion as an alternative new motion under Sections 2243 and 2255 of Title 28 U.S.C. but *reserved the determination* of such questions on the merits until such clarification.

III. THE COURT WAS IN ERROR IN HOLDING THAT ITS OPINION OF FEBRUARY 10, 1965, WAS "LAW OF THE CASE."

The rule of the "law of the case" is not absolute as *res judicata* but only a matter of policy to be disregarded at the Court's discretion when to follow it would result in injustice. The Court ignored the cases cited in our briefs to that effect, and the rule should be disregarded when constitutional rights of defendants are involved. We submit that this Court should correct its former erroneous decision, at least so far as the violation of appellants' rights of privacy and discharge therefor are concerned.

IV. THIS COURT REFUSED TO CONSIDER THE EFFECT OF THE GRANTING *CERTIORARI* BY THE SUPREME COURT IN *KATZ v. UNITED STATES*, 369 F. 2d 130, WHEREIN A TRANSMITTING DEVICE WAS USED.

The facts in favor of *Katz* are not as strong as in this case, for the secret transmitting was made from Marchese's apartment, whereas in *Katz* the transmitting was made from a public telephone booth. This Court implied that the decision in *Katz* might have no retroactive application. However, the non-retroactivity should not be applied to situations where the matter has been brought to the attention of the courts both at trial and on appeal.

V. THIS COURT ERRONEOUSLY STATED THAT APPELLANTS' FREEDOM ON BAIL WAS A "SAD COMMENTARY ON HOW DELAYS CAN BE ACHIEVED THAT DESTROY IN THE CERTAINTY OF PUNISHMENT FOR CRIME."

The Court overlooked or ignored the following matters:

(1) When Judge Clarke discharged appellants, they had already served 4-1/2 years in prison, and by reason of their excellent prison records, under the prison rules, they had already established enough good time to make up for more than one-half of their 10-year sentence. Except for provision in the narcotic laws prohibiting parole, they would long since

have been eligible for parole.

(2) The order of discharge was made only after the Supreme Court had reversed this Court and sent the case back for reconsideration by the *District Court*.

(3) The Government itself engaged in dilatory tactics in perfecting and prosecuting its appeal from the order, being twice in default, and motions by Marchese and Del Bono to dismiss were denied by this Court. The Government filed its opening brief ten months after the order, and this Court had the appeal under submission for about five months. The Supreme Court did not deny *certiorari* until eight months after petition was filed. On the last appeal this Court had the matter under submission for six months. At all times appellants have been diligent in prosecuting the proceedings.

(4) The granting of *certiorari* and reversal of this Court in 1963 had considerable significance in that it took place only two weeks after the *Lopez* decision. On the other hand, the denial of *certiorari* on the last petition imported neither approval nor disapproval of this Court's decision. (*Maryland v. Baltimore etc.*, 338 U.S. 912.)

(5) Since the freedom of appellants on bail was based on a discharge for violation of their constitutional rights, even though this Court disagreed, then they were entitled to be free, and to retain them in prison would be a travesty of justice, especially since they had already undergone considerable punishment through long imprisonment.

(6) Prior to the present decision, this Court has consistently avoided a direct ruling respecting the violation of appellants' constitutional rights of privacy through the use of hidden transmitter, and we submit its ruling now is based on an inapposite decision of the Supreme Court and a misinterpretation thereof.

We respectfully suggest that rehearing be granted and that the petitions be heard *en banc*, especially since the present panel - composed throughout by two of the same members - has consistently rendered decision adverse to appellants.

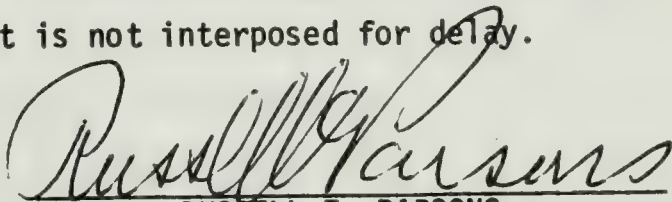
Respectfully submitted,

BURTON MARKS and BRUCE I. HOCHMAN
Attorneys for Michele Marchese

RUSSELL E. PARSONS
Attorney for Jesse Del Bono

CERTIFICATE OF COUNSEL

I, RUSSELL E. PARSONS, hereby certify on behalf of
Burton Marks and Bruce I. Hochman, attorneys for Michele
Marchese, and for myself as attorney for Jesse Del Bono,
that in my judgment the Petition for Rehearing is well
founded and that it is not interposed for delay.

A handwritten signature in cursive script, reading "Russell E. Parsons", written over a horizontal line.

RUSSELL E. PARSONS
Attorney for Jesse Del Bono
and on behalf of
BURTON MARKS and BRUCE I. HOCHMAN
Attorneys for Michele Marchese

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
County of Los Angeles) ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on June 8th, 1967, I served the within PETITION FOR REHEARING (No. 20,893 - MARCHESE and DEL BONO) on the following named parties by depositing the designated copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, United States Court of Appeals
For the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101 - Original & 20 copies

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California - 3 copies

I further declare that concurrent with the above service I did serve MOTION TO WITHHOLD JUDGMENT AND MANDATE AND TO STAY EXECUTION OF JUDGMENT; AFFIDAVIT OR RUSSELL E. PARSONS and BURTON MARKS (No. 20,893 - MARCHESE and DEL BONO) on the following named parties by depositing the designated copies thereof, inclosed in the aforesaid sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, United States Court of Appeals
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San Francisco, California 94101 - Original & 3 copies

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California - 1 copy

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8th, 1967, at Los Angeles, California.

Signature

Subscribed and sworn to before me
this day of June, 1967.

Notary Public in and for
the State of California

DEAN-STANDEFER
215 West Fifth Street
Los Angeles, California
MAdison 8-6898

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD PAUL WARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

AUG 22 1966

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD PAUL WARD,

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vs.

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Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On October 20, 1965, a four count indictment was returned against the appellant, Richard Paul Ward, and co-defendant Richard Joseph Chirenza, by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2-5]. ^{1/}

The first count charged that on or about September 30, 1965, appellant and co-defendant Chirenza knowingly and unlawfully received, concealed, and facilitated the transportation and concealment of 154 grams of marihuana.

^{1/} C. T. refers to Clerk's Transcript of appeal.

The second count charged that on the same day appellant and co-defendant Chirenza knowingly and unlawfully transferred the same quantity of marihuana to an undercover assistant of the Federal Bureau of Narcotics without obtaining from him a written order on a form issued for that purpose by the Secretary of Treasury.

The third count charged that on or about September 30, 1965, appellant and co-defendant Chirenza knowingly and unlawfully received, concealed, and facilitated the transportation and concealment of 618 grams of marihuana.

The fourth count charged that on the same day the co-defendant Chirenza knowingly and unlawfully received, concealed, and facilitated the transportation and concealment of 730 grams of marihuana.

Appellant and co-defendant Chirenza were arraigned and entered pleas of not guilty on October 25, 1965 [C. T. 20].

On November 1, 1965, co-defendant Chirenza entered a plea of guilty to Count One of the indictment [R. T. 10]. ^{2/} The appellant was then tried alone on Counts One, Two and Three of the indictment. The jury was impaneled on November 1, 1965, and the case continued for trial on November 3, 1965 [R. T. 18, 30]. On November 5, 1965, the appellant was found guilty as charged in the indictment [C. T. 19].

On December 16, 1965, the appellant was committed to the

^{2/} R. T. refers to Reporter's Transcript of the trial.

custody of the Attorney General for a period of six years on each of Counts One and Two of the indictment, sentence on each of the counts to run concurrently. The Court on its own motion acquitted the appellant on Count Three [C. T. 36].

Appellant filed a timely Notice of Appeal on December 22, 1965 [C. T. 38], and on December 27, 1965 the Court filed an Order granting appellant leave to appeal in forma pauperis [C. T. 41].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, Title 21, United States Code, Section 176(a), and Title 26, United States Code, Section 4742(a). This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) provides in pertinent part:

" . . . whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. "

Title 26, United States Code, Section 4742(a) provides in pertinent part:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under Sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred on a form to be issued in blank for that purpose by the Secretary or his delegate. "

III

STATEMENT OF FACTS

On September 30, 1965, Gordon Brucker, an undercover assistant of the Federal Bureau of Narcotics, was under the supervision of Agents of the Federal Bureau of Narcotics participating in the investigation of possible narcotics transactions [R. T. 187]. Brucker called the residence of co-defendant Chirenza and had a conversation with him [R. T. 62; 188]. Agent Paulus of the Federal Bureau of Narcotics then reached Brucker, gave him \$60 in marked currency and placed a Kel transmitter unit on his person [R. T. 64, 188].

Brucker then proceeded to drive his 1958 Cadillac convertible to the Spot Market in Compton [R. T. 64, 189]. Upon arriving at the Spot Market, Brucker pulled into the parking lot and parked near a 1956 white Oldsmobile. There were two persons in the vehicle. The driver was the appellant, Ward, and the passenger, co-defendant Chirenza [R. T. 64, 189, 190]. Chirenza then got out of the Oldsmobile driven by appellant and entered Brucker's automobile on the passenger side. Chirenza told Brucker they had the marihuana but indicated that it was stashed away from the market. He directed Brucker to drive out of the parking lot [R. T. 190]. Brucker, at the direction of Chirenza, drove his vehicle about three blocks from the Spot Market where the car was stopped in the middle of the 1800 block on 152nd Street. Appellant followed closely behind in the 1956 white Oldsmobile and parked behind the Cadillac. Two surveillance units of the Federal Bureau of Narcotics parked further down the street [R. T. 65, 190]. Brucker and Chirenza remained in the Cadillac and appellant got out of the Oldsmobile and walked past the passenger side of the Cadillac to a group of trash cans in front of the Cadillac. Appellant moved some papers aside from one of the cans and took out a white round package. He brought the package back to the passenger side of the Cadillac and handed it to Chirenza [R. T. 65, 154, 191]. Chirenza then said here it is and indicated he had brought "five cans". Brucker indicated he wanted to check the marihuana before giving Chirenza the money. At this point appellant, who had been at the passenger side of the Cadillac convertible, went back and got

into the Oldsmobile [R. T. 154, 155; 192-193]. Brucker then checked the five sacks of marihuana that were contained in the white package appellant had brought Chirenza and counted out \$50 in currency which he gave to Chirenza. Chirenza got out of the Cadillac, went back and got into the passenger side of the Oldsmobile and appellant drove away [R. T. 193-194].

Brucker then drove away and was followed by Agents Krueger and Paulus. They again searched his car and person and removed the Kel transmitter, the extra \$10 advance funds, and package he had obtained from Chirenza [R. T. 66, 194]. The substance in the package was found to be 154 grams of marihuana [R. T. 144].

Agent Paulus then proceeded to the apartment of Chirenza where he met with Agents Sherman and Coonce [R. T. 68]. Agent Paulus went up to the front door of the apartment, knocked on the door and announced he was an agent of the Federal Bureau of Narcotics who was there to arrest Chirenza. Chirenza looked out the window and then proceeded to open the front door [R. T. 69]. When the door was opened appellant was observed to be standing over the coffee table in the front room of the apartment. The coffee table had a large plastic white jar setting on it and appellant was standing over this jar rolling what appeared to be the end of a cigarette [R. T. 70]. The appellant turned and ran into the bathroom where he threw the cigarette into the toilet and flushed the toilet [R. T. 70, 157-158]. The plastic white jar was found to contain approximately 600 grams of marihuana [R. T. 144]. This is the marihuana indicated in Count Three of the indictment.

At this time a search was made of the apartment and the 730 grams of marihuana indicated in Count Four of the indictment was found in the bedroom [R. T. 73].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal: 3/

1. "That appellant was denied a fair trial in that appellant was denied effective representation by counsel because counsel was denied adequate time for preparation prior to trial."
2. "Appellant was deprived of a fair trial due to the misconduct of deputy United States Attorney Dees and that the most blatant example of said misconduct was when said Deputy United States Attorney attempted to put into evidence an exhibit (marihuana) when he knew said exhibit was not material or relevant or admissible against appellant."
3. "That appellant was, as a matter of law, convicted upon insufficient evidence for either Count One and/or Count Two herein involved."

3/ Appellant's Opening Brief, pp. 4, 9, 10.

ARGUMENT

- A. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR CONTINUANCE WAS NOT AN ABUSE OF DISCRETION AND DID NOT DENY THE APPELLANT OF EFFECTIVE REPRESENTATION BY COUNSEL.
-

The question of whether a party has had sufficient time for the preparation of his case and whether a continuance should be granted in one within the sound discretion of the Court, the exercise of which in the absence of abuse is not reviewable.

Elkins v. United States, 266 F.2d 588

(9th Cir. 1959);

Sherman v. United States, 241 F.2d 329

(9th Cir. 1957);

Hutson v. United States, 238 F.2d 167

(9th Cir. 1956);

Williams v. United States, 203 F.2d 85

(9th Cir. 1953).

In this case the Court appointed Lynn R. Eastman as counsel for the appellant on October 25, 1965 [C. T. 20]. The same day the appellant entered a plea of not guilty as to Counts One, Two and Three of the indictment and the case was set for trial on November 1, 1965 [C. T. 20].

On the morning of trial, November 1, 1965, the appellant

appeared with counsel. At this time counsel requested a continuance until " . . . November 15th to November 22nd . . ." [R. T. 4]. As basis for his request counsel pointed out to the Court that:

"Since last Monday I have spent a considerable matter of time on this file but I am not prepared, I haven't had a chance to visit the scene or make a complete investigation, I haven't had a chance to talk to the witnesses, I don't have the name of the informer . . ." [R. T. 13, lines 20-25].

On the basis of these representations the Court granted a continuance for two days until Wednesday, November 3, 1965 to enable counsel to do further investigation [R. T. 14].

This further extension of time coupled with the previous investigation by counsel was adequate time for the preparation of the case. The record bears out this fact. The Assistant United States Attorney provided counsel with the substance of the arrest report [R. T. 14]. Counsel talked with the appellant and co-defendant Cherinza [R. T. 448]. He visited the Spot Market and the 152nd Street location [R. T. 91]. He called five witnesses for the defense. He effectively objected to the introduction of physical evidence and testimony during the course of the trial [R. T. 62, 73]. He was provided with the name of the informant at the time of trial [R. T. 187]. The remainder of the witnesses were Federal Narcotics Agents whom counsel effectively cross-examined during the course of trial.

The appellee respectfully submits that the District Court's denial of appellant's motion for continuance till November 15th, when coupled with the two day continuance granted, was a proper exercise of discretion resulting in no prejudice to appellant. This being the case the District Court's exercise of its discretion should not be disturbed.

Heay v. Phillips, 201 F.2d 220 (9th Cir. 1952).

B. THE CONDUCT OF THE UNITED STATES ATTORNEY DURING THE COURSE OF THE TRIAL DID NOT AMOUNT TO MISCONDUCT, AND IN ANY EVENT HIS CONDUCT RESULTED IN NO PREJUDICE TO THE APPELLANT.

It is argued by appellant that there was prejudicial misconduct on the part of the United States Attorney when he attempted to introduce a quantity of marihuana, marked as Government's exhibit number three for identification, into evidence. This exhibit number three is the marihuana mentioned in Count Four of the indictment which names only the co-defendant Chirenza.

The United States Attorney marked the exhibit for identification and inquired of Agent Paulus where he first saw the exhibit [R. T. 73]. No mention was made by anyone before the jury as to the nature of the contents of the exhibit. At this time appellant objected and, in the presence of the jury, pointed out to the Court

that apparently this exhibit is going to pertain to Count Four of the indictment in which Mr. Ward is not named [R. T. 73]. The United States Attorney then argued that because of what appeared to him to be a partnership relation, possession by one could be transmitted to the other [R. T. 73, line 23]. The Court sustained appellant's objection and instructed the jury to disregard the testimony of the witness with respect to exhibit number three [R. T. 74-75]. As a result of this ruling the jury was only aware by the testimony elicited from the witness that a brown paper wrapped package was seized in Mr. Chirenza's bedroom. This testimony they were instructed to disregard.

At the time the United States Attorney sought to introduce the evidence appellant did not make a motion for mistrial. He chose rather to gamble on the verdict, and since it was not favorable to him, he now raises the issue of misconduct. Without a motion for a mistrial an appeal based upon misconduct is waived.

Jenkins v. United States, 251 F.2d 51
(5th Cir. 1958).

A holding to the same effect may be found in Harris v. United States, 261 F.2d 897 (9th Cir. 1959), wherein the Court indicated at page 902:

"In Alberty v. United States, 9th Cir. 1937, 91 F.2d 461, 463, the assignments of error raised questions as to the propriety of Government counsel's conduct. The Court stated at page 463:

" 'Whatever hesitation counsel may have

regarding a claim of misconduct of a trial judge, there is none in claiming it against the prosecutor. It should be made at once. The Court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the Court and jury, in an extended trial and, without objection or motion for relief, raise the same questions on appeal. The same view was expressed in Powell v. United States, 9 Cir. 1929, 35 F.2d 941.' "

Also see: Cellino v. United States, 276 F.2d 941
(9th Cir. 1960).

Further, even in the event the Court decides to review the alleged misconduct, an analysis would disclose that this isolated incident of misconduct, if the Court should choose to call it such, was not such as to so prejudice the jury to deny the appellant a fair trial. This is true especially in this case where the exposure to the evidence was so slight and the Court instructed the jury they should disregard the testimony concerning the evidence.

Berger v. United States, 295 U.S. 78 (1934);

Kasper v. United States, 225 F.2d 275

(9th Cir. 1955);

Nye v. Nissen, 168 F.2d 846 (9th Cir. 1948);

United States v. Goodman, 110 F.2d 390

(7th Cir. 1940).

C. AS THE APPELLANT DID NOT MAKE A MOTION FOR JUDGMENT OF ACQUITTAL AT ANY TIME DURING THE COURSE OF THE TRIAL, THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE IS NOT OPEN ON APPEAL.

Before the appellant can ask this Court to review the judgment of the District Court on the grounds of the sufficiency of the evidence, he must preserve this basis by appropriate motion in the trial Court. Rule 29(a) of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

" . . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."

In the instant case no motion for judgment of acquittal was made either at the close of the Government's case or at the close of all the evidence [R. T. 210, 364, 445].

By failing to interpose his motion in the trial court appellant has waived his right to appeal on the sufficiency of the evidence.

Hardwick v. United States, 296 F.2d 24

(9th Cir. 1961);

Foster v. United States, 318 F.2d 684

(9th Cir. 1963);

Castro v. United States, 323 F.2d 683

(9th Cir. 1963);

Dawkin v. United States, 324 F.2d 521

(9th Cir. 1963).

The Government is not unmindful of Rule 52(b) of the Federal Rules of Criminal Procedure, and such decisions as Bruno v. United States, 259 F.2d 8 (9th Cir. 1958) and Lucas v. United States, 325 F.2d 867 (9th Cir. 1963) wherein the Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a palpable miscarriage of justice, but feels that no injustice would here result.

And in any event, the evidence was sufficient to support the verdict. Appellant argues that the Government failed to show that he possessed knowledge that Exhibit one contained marihuana. As the Government cannot look into the mind of appellant it is required to meet this burden of proving the appellant's state of mind by circumstantial evidence. The evidence in this case clearly supports the trier of facts determination that the appellant had this knowledge.

Appellant left Chirenza's apartment and went with him to plant the marihuana in the trash can on 152th Street [R. T. 233]. He then drove with Chirenza to the Spot Market to await the arrival of Brucker [R. T. 64, 187, 190]. He then drove Chirenza's automobile back to the 152nd Street location [R. T. 65, 190]. Immediately he got out of the car and walked past Brucker's automobile to the trash can which contained the marihuana. Chirenza did not direct appellant to the trash can; rather appellant went and

recovered the marihuana without instructions [R. T. 201]. He returned the white package containing the five sacks of marihuana to Brucker's automobile [R. T. 65, 154, 191]. Chirenza then unwrapped the packages in his presence and handed it to Brucker. In appellant's presence, Chirenza said to Brucker, "Here it is. Give me the money and I will split." [R. T. 205]. Appellant then returned to Chirenza's automobile waited for him to enter and then drove the car away [R. T. 193-194].

Viewing this evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the Government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F.2d 825
(9th Cir. 1964);

Mosco v. United States, 301 F.2d 180
(9th Cir. 1962);

Bolin v. United States, 303 F.2d 870
(9th Cir. 1962).

VI

CONCLUSION

For the reason stated above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROGER A. BROWNING,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning
ROGER A. BROWNING

See Vol. 3381

United States Court of Appeals

NINTH CIRCUIT

NO. 20917

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant

Appeal from the United States District Court
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

PETITION FOR REHEARING

RUSSELL E. PARSONS
RICHARD CHRISTENSEN
BY: RUSSELL E. PARSONS
205 South Broadway
Los Angeles, Calif. 90012
Attorneys for Appellant

MAY 8 1967

FILED

Petition for hearing on following grounds:

I

The court erred in holding that the evidence was sufficient for the jury to find that McCowan "was neither the sender nor the sender's agent" and that "federal protection over this mail extended not only to the obtaining of the package from the Post Office but to McCowan's subsequent act of opening the package before it had been delivered to the addressee".....

2

II

The prejudicial effect of the misconduct of the United States Attorney was such that it could not be cured by the instruction of the court to the jury.....

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IN THE
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant.

Appeal from the United States District Court, Southern
District of California, Central Division,
Honorable Charles H. Carr, Judge.

PETITION FOR REHEARING

Petitioner respectfully asks this Court for rehearing of its
decision of April 4, 1967, affirming the judgment of the United
States District Court. Said petition is made on the following
grounds:

THE COURT ERRED IN HOLDING THAT THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT McCOWAN "WAS NEITHER THE SENDER NOR THE SENDER'S AGENT" AND THAT "FEDERAL PROTECTION OVER THIS MAIL EXTENDED NOT ONLY TO THE OBTAINING OF THE PACKAGE FROM THE POST OFFICE BUT TO McCOWAN'S SUBSEQUENT ACT OF OPENING THE PACKAGE BEFORE IT HAD BEEN DELIVERED TO THE ADDRESSEE."

We respectfully urge that under the facts, such conclusion is not sustained by the law and the cases cited. *United States v. Dogwood* (7th Cir.) 360 Fed. 2d 905, 908, we urge is in our favor and enumerates postal custody and receptacles covered by the law. No such situation as shown in the McCowan case is made a federal offense. The court, therefore, lacked jurisdiction. Remember: McCowan went to the post office with the sister - Jean Ortiz, together the package was mailed. The rings were entrusted to McCowan by Joan Ansel, and he would be answerable to her as agent or bailee. We again urge this law was not intended to cover the situation here depicted. In *United States v. Dogwood, supra*, the Court said:

"The record fully establishes that the defendant stole Walley's driver's license and therefore possessed it with the knowledge that it was stolen. But the evidence, although viewed in a light most favorable to the government merely shows that the defendant stole the license after the letter from which he abstracted it had been delivered to his mother, the landlady, who received or collected the mail for her tenants. But Sec. 1708 in defining the offenses it interdicts enumerates the postal custody, mail receptacles, and 'other authorized depository' for mail matter . . ."

United States v. Dogwood, supra,
360 Fed. 2d 905, 908.

THE PREJUDICIAL EFFECT OF THE MISCONDUCT OF THE UNITED STATES ATTORNEY WAS SUCH THAT IT COULD NOT BE CURED BY THE INSTRUCTION OF THE COURT TO THE JURY.

Notwithstanding the admonition by the court, the Assistant United States Attorney attempted to do the same thing again. The court attempted to correct the damage, but one would be naive indeed to argue that an instruction could thus cure the prejudicial effect of such misconduct.

The Court's reasoning runs counter to the basic theory of *Michelson v. United States*, 335 U.S. 469, adopted with approval in *Benton v. United States* (4th Cir. 1956) 233 Fed. 2d 491. See also an expression by this Court in *Thurman v. United States*, 316 Fed. 2d 205, where the Court said:

"But the prejudicial effect of such material is notorious. 1 Wigmore, Evidence, Sec. 194 (3rd ed. 1940); McCormick, Evidence 327 (1954). Indeed, the danger is so strong that the jury will infer from unrelated criminal conduct that the defendant probably committed the offense charged, or will condemn the defendant either for the unrelated conduct or simply because he is a bad person, regardless of his guilt or innocence of the offense charged, that admission of such material is treated as obviously prejudicial and admonitory instructions are commonly considered inefficacious. See, e.g. *United States v. Magee*, 261 Fed. 2d 609 (7th Cir., 1958); *Sang Soon Sur v. United States*, 167 Fed. 2d 431, 433 (9th Cir., 1948). Cf. *Marshall v. United States*, 360 U.S. 310 . . . (1959).

"We cannot say that in this case the error 'did not influence the jury, or had but very slight effect.' *Kotteakos v. United States*, 328 U.S. 750, 764 . . . (1946). See *Hawkins v. United States*, 358 U.S. 74, 79 . . . (1958)."

CONCLUSION

For the reasons stated, we respectfully ask for a rehearing and, as this may be a case of first impression, that it be heard by the court *en banc*.

Respectfully submitted,

RUSSELL E. PARSONS
RICHARD CHRISTENSEN

BY: RUSSELL E. PARSONS

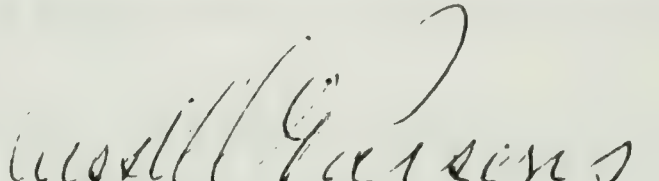
Attorneys for Appellant

C E R T I F I C A T E O F C O U N S E L

STATE OF CALIFORNIA)
)
County of Los Angeles)

I, RUSSELL E. PARSONS, attorney for Appellant MICHAEL
ALLAN McCOWAN, do hereby certify that, in my opinion, the within
Petition for Rehearing is well founded, and that it is not inter-
posed for delay.

DATED at Los Angeles, California, this 2nd day of May,
1967.



Russell E. Parsons

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
County of Los Angeles) ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on May , 1967, I served the within PETITION FOR RE-HEARING (United States v. McCowan - No. 20917) on the following named party by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May , 1967, at Los Angeles, California.

D. A. Standefer

Subscribed and sworn to before me
this day of May , 1967.

Notary Public in and for
the State of California

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN,

NO. 20918

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the

Southern District of California, Southern Division

Honorable James M. Carter, District Judge

APPELLANT'S OPENING BRIEF

FILED

OCT 13 1966

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NOV 4 1966

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN,

NO. 20918

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the

Southern District of California, Southern Division

Honorable James M. Carter, District Judge

APPELLANT'S OPENING BRIEF

JURISDICTION
(Rule 18-2(b))

Appellant, Howard Gerald Minkin, was indicted, with others, in the United States District Court for the Southern District of California, Southern Division, on charges of conspiracy to smuggle marijuana in violation of United States Code, Title 21, Section 176a, and aiding and abetting marijuana smuggling, in violation of United States Code, Title 21, Section 176a, and Title 18, Section 2. (R. 2-4). The District Court had jurisdiction under United States Code Title 18, Section 3231. This Court has jurisdiction to review the judgment of conviction under United States Code, Title 28, Section 1291.

The case at bar involves the validity, as applied

to appellant, of the following statutes:

70 Stat. 570-571; United States Code,
Title 21, Section 176a. (In part).

"Section 2 of the Narcotic Drugs
Import and Export Act, as amended,
is amended by adding at the end
thereof the following:

'(h) Notwithstanding any other
provision of law, whoever, knowingly,
with intent to defraud the United
States, imports or brings into the
United States marihuana contrary to
law, or smuggles or clandestinely
introduces into the United States
marihuana which should have been
invoiced, or receives, conceals,
buys, sells, or in any manner
facilitates the transportation,
concealment, or sale of such mari-
huana after being imported or brought
in, knowing the same to have been
imported or brought into the United
States contrary to law, or whoever
conspires to do any of the foregoing
acts, shall be imprisoned not less
than five nor more than twenty years

and, in addition, may be fined not more than \$20,000.00

* * * * *

'For provision relating to sentencing, probation, etc., see section, 7237(d) of the Internal Revenue Code of 1954.'

70 Stat. 569; Internal Revenue Code of 1954, Title 26. United States Code, Section 7237(d) (In part).

"Upon conviction --

"(1) Of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

* * * * *

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as

amended, shall not apply."

68A Stat. 565; United States Code,
Title 26, Section 4755(a)(1)

"It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax."

STATEMENT OF THE CASE
(Rule 18-2 (c))

The indictment charged in the first count that appellant conspired with Stanley Alvin Garelle and Kevin Patrick Rafferty to smuggle marijuana into the United States in violation of United States Code, Title 21, Section 176a, and that on or about May 12, 1965, Kevin Patrick Rafferty committed an overt act to effect the object of the conspiracy by entering the United States from Mexico in an automobile containing approximately 79 pounds of marijuana. (R. 2-3). The second count charged that appellant and Stanley Alvin Garelle aided and abetted the smuggling of the 79 pounds of marijuana with which Kevin Patrick Rafferty entered the United States on or about May 12, 1965. (R. 4).

Appellant was tried alone. Only the second count of the indictment was submitted to the jury. (Rep.Tr. 167, 208-209). It found appellant guilty. (R. 25). He was sentenced to the five year minimum term provided in United States Code, Title 21, Section 176a.

Evidence

According to the evidence adduced by the Government, Kevin Patrick Rafferty was an admitted smuggler. (Rep.Tr. 92, 106-107). He had recently attempted to smuggle marijuana into the United States, but had lost the contraband in the mountains while attempting to cross the

border. (Rep.Tr. 107-108). He testified that appellant knew of his smuggling activities and had agreed to raise money for a new smuggling venture. (Rep.Tr. 92). According to Rafferty and Garelle, appellant did supply them with money. (Rep.Tr. 93-95, 130-131). They went to the interior of Mexico, purchased the marijuana, and returned to Tijuana. (Rep.Tr. 95-98).

Rafferty and Garelle were apprehended by an Immigrant Inspector at about 2:45 P.M. on May 12, 1965, in the act of attempting to bring the marijuana by automobile through the Port of Entry at San Ysidro. (Rep.Tr. 59-62). They and the contraband were delivered to a Customs Agent. (Rep.Tr. 62-63, 65-67). By 3:00 P.M. they were in the Customs Agency office. (Rep.Tr. 76). Rafferty testified:

"THE CLERK: Would you state your name, please.

"THE WITNESS: Kevin Rafferty.

"THE COURT: You are represented by an attorney, are you not?

"THE WITNESS: I am, sir, but he is not in court now.

"THE COURT: And you discussed with him whether or not you should testify in this case.

"THE WITNESS: He told me to give the Court my complete cooperation.

'THE COURT: He knows you are here
testifying?

"THE WITNESS: Yes, sir.

"THE COURT: All right.

DIRECT EXAMINATION" (Rep.Tr.
90).

* * * * *

"A When we were arrested -- I
would like to bring this up, as far
as the persuasion bit goes -- I was
sick. I asked Mr. Ellis if I could
go to the bathroom. He took me to
the bathroom, and in taking me to
the bathroom, he said to me -- you
know, I had refused to give any testi-
mony. We had made an agreement prior
to being arrested, myself and Mr.
Garelle, that if we were arrested,
we would zip our lips and not say a
word, but when we were arrested, they
put us in this small, little room and
it really made me -- I just couldn't
fathom five years of that -- and Mr.
Ellis said to me that he had me cold,
and it was true. He had caught me

with marijuana in my possession, and he told me if I -- he told me I might as well give myself any opportunity there was that if -- he said to me, 'Just come clean and cooperate because fighting--' you know, they had me cold anyhow, so I just, I asked to speak to Mr. Garelle, and I spoke to Mr. Garelle, and we gave Hyman up." (Rep.Tr. 109-110).

"Hyman", is appellant. (Rep.Tr. 92).

* * * * *

"THE WITNESS: After thinking it over, myself and Mr. Garelle, after thinking it over, that it would be better for us and our futures, we decided to turn Mr. Minkin in. Mr. Ellis did not want to take any chances. Apparently he had, maybe somebody had tried to fool him in the past years -- he asked me if I had a meeting with Mr. Minkin in San Francisco?

* * * * *

"THE WITNESS: I told him nothing was definite because the time of my arrival was not definite. It was illegal and we were dealing in contraband

goods, and you can't really put a time or date on it, so he told me, 'Could you call him up?' so I had Mr. Minkin's number in my address book, so I called him up and he called me back and I encouraged the conversation to prove to him that we were not putting him on; that is trying to fool him, and that is the basis." (Rep.Tr. 142).

* * * * *

"Q Now, you intended in this conversation you started with the word, "Shalom" to create in the mind of Mr. Minkin that you were out somewheres free, that you weren't under arrest. You wanted to conceal that, didn't you? That was your first thought.

"A Yes, sir.

"Q Wasn't that also an understanding you had with Mr. Ellis that you would start your conversation along these lines and conceal the fact that you were under arrest?

"A Well, as I said earlier, the phone --

"THE COURT: The question is: was

there or was there not an understanding with Mr. Elliz?

"THE WITNESS: I had no understanding with Mr. Ellis as far as the content of the conversation. He asked me for proof I had no meet with Mr. Minkin, I had no place to meet him and drop the grass off. I was supposed to call him when I got back to San Francisco. They asked me -- well, they told me, 'If you're going to cooperate, let's get up there now and make the meeting.' I told them I had no meeting.

"Then I thought in my mind, well, Mr. Minkin owed me money. He had not given me all the money for the trip, and I thought that if I called him up, I might be able to satisfy Mr. Ellis's curiosity in regards to me telling the truth or not.

"BY MR. FRIEDMAN:

"Q It was more than curiosity.

"A Yes, it was.

"Q The purpose of it was to try to implicate Mr. Minkin, so you would

get a lighter sentence; isn't that the purpose of it?

"A Well, I'm hoping for it. You know I would like to eradicate the whole mess, but I don't see how it could be possible, sir. I have not been promised anything, sir. That's all I can say."
(Rep.Tr. 145-146).

Customs Agent Ellis testified:

"Q Did you induce Mr. Rafferty at that time to make a phone call to Mr. Minkin?

"A Mr. Rafferty did make a phone call to Mr. Minkin.

"Q Did you induce him to do so?

"A I don't know how we could call this induced part.

"THE COURT: That's a conclusion. If you want to ask the conversation, if you want it, you can have it.

* * * * *

"Q You say he made a conversation while in your custody.

"A Yes, he did.

"Q And you had a monitoring device that you listened in when he made it; is

that right?

"A Yes I did. (Rep.Tr. 77).

* * * * *

"Q And in your presence did he try to make that call around 3:00 o'clock in the afternoon?

"A I think it was a little later than 3:00 o'clock; probably in the neighborhood of 5:00.

"Q Well, he tried to make it at 3:00 first and then had to wait there about two hours for an answer.

"A No. It was someplace in the neighborhood of 5:00 o'clock when he made his first call.

"Q When did he get the answer, or get a call back? He didn't get Mr. Minkin right away, did he?

"A No, sir.

"Q So he waited there and you waited with him, right?

"A Yes.

"Q Now, when did he make contact with Mr. Minkin?

"A Mr. Minkin returned his call at approximately, I would say, five

minutes or fifteen minutes after 6:00. I don't recall the exact minute.

"A That would be about an hour after he put the call in?

"A Approximately, yes.

"Q All that time you waited patiently there with your monitoring device; is that right?

"A Yes, sir.

"Q Did you induce Mr. Rafferty to tell -- first, to conceal the fact he was under arrest when he called Minkin?

"A That's true.

"THE COURT: Wait a minute. The question is: did you induce him to conceal the fact that he was under arrest? Induce is a conclusion.

"MR. FRIEDMAN: The witness has answered, your Honor. He said, 'That's true.'

"THE COURT: I don't think he understood the question; is that right?

"THE WITNESS: I didn't understand it in that respect.

"MR. FRIEDMAN: I move to strike.

"THE COURT: State your objection.

"MR. FRIEDMAN: My objection is that I object to this witness being bailed out by the Court. He has already answered the question.

"THE COURT: Overruled. Be seated. He said he misunderstood.

"MR. FRIEDMAN: What is your understanding?

"Would you read that question back.

"(Reporter read: 'Did you induce Mr. Rafferty to tell -- first, to conceal the fact he was under arrest when he called Minkin?' and 'That's true.')

"THE COURT: All right. You want to state something further?

"THE WITNESS: I would like to explain on this point here.

"MR. FRIEDMAN: I didn't ask for an explanation yet.

"THE COURT: He has asked to explain; overruled.

"THE WITNESS: The 'induced' part that counsel is making here, my 'inducing' part is that I convinced the

men to cooperate with me in making this phone call.

"As to the use of force or anything of that nature, I had nothing in mind, to the meaning of the induced part.

"BY MR. FRIEDMAN:

"Q Is that your explanation?

"A Yes, sir.

"Q That you weren't using force; is that what you meant?

"A No, sir; absolutely not.

"Q What kind of persuasion were you using?

"A Word of mouth.

"Q What were you telling Rafferty he would get if he could entrap in some way Mr. Minkin to admitting a possible connection with Mr. Rafferty's carrying the marijuana across the border?

"A He was --

"THE COURT: These questions are not proper. What are you sitting there for Mr. Johnson? Entrap is a legal question.

"MR. JOHNSON: Yes, I will object.

It is argumentative also.

"THE COURT: If you want the conversations, you can have them.

"Take a recess until 1:30.

"Remember the admonition of the Court.

"(The court recessed at 12:05 p.m., November 2, 1965, until 1:30 p.m., November 2, 1965.)" (Rep.Tr. 77-80).

* * * * *

"Now, did you tell us that you didn't use force to get him to make this call, but you used another kind of persuasion. What was the other type of persuasaion you used to get him to make this call?

"THE COURT: You want the conversation?

"MR. FRIEDMAN: No, I don't.

"THE COURT: How can he answer without giving his conclusion?

"MR. FRIEDMAN: Your Honor, as a matter of fact, the purpose of these questions is to solicit the circumstances under which this con-

versation was secured, and make a motion out of the presence of the jury.

"THE COURT: I understand, but you may ask the witness for facts, but you cannot ask for conclusions.

"MR. FRIEDMAN: I agree. I'm trying to do it factually, but I don't want to get into the conversation because that will be the substance of a motion out of the presence of the jury.

"THE COURT: You may ask leading questions. It is cross examination and you may say, 'Did you do this by talk?' or, 'Did you do it by twisting his arm?'

"You may ask leading questions -- it is cross examination -- but you can't ask for his conclusions.

"BY MR. FRIEDMAN:

"Q What did you say to Rafferty, or put it this way: what was the conversation between you and Rafferty which led to his making this phone call?

"A I asked Mr. Rafferty concerning

the marijuana and he said it was his and he was in business with another man by the name of Hyman Minkin who furnished the money for him and, with that in mind, I asked him if he would cooperate with the government and make the phone call to Mr. Minkin, who was supposed to have been then waiting for a phone call in San Francisco. And Mr. Rafferty said he would, and he made the phone call.

"Q All right. Now in the conversation with Mr. Rafferty, while Mr. Rafferty was making this phone call, did you promise Mr. Rafferty anything in exchange for attempting to secure, if he could, some admission of some kind of complicity in this act of taking the marijuana from Minkin? Did you promise him anything?

"A I did not.

"Q Did you ask him to conceal the fact that he was under arrest?

"A I don't recall that I asked him to conceal those facts; however, I believe he did it himself.

"Q Did you overhear him say he was at a motel?

"A No, I did not.

"Q What did Mr. Rafferty indicate to you he expected from you as an agent of the government in exchange for attempting to implicate a man in San Francisco?

"A Nothing.

"Q You had him cold with 76 pounds of marijuana, right?

"A Yes, sir." (Rep.Tr.82-84).

The telephone conversation between appellant and Rafferty was recorded. The recording was ultimately played to the jury. (Plaintiff's exhibit 10, Rep.Tr. 150-151). During the conversation Rafferty asked appellant to send him money, which appellant agreed to do. (Rep.Tr. 140-141). Rafferty said, "I have got the grass." Appellant replied, "Mazeltoff.", an expression meaning either congratulations or good luck. (Rep.Tr. 127-128). Appellant subsequently put \$200.00 in Rafferty's bank account.

Appellant's trial began on November 2, 1965. (Rep. Tr. 42). On that date the cause was severed as to Garelle and Rafferty. (R. 40). They both testified against appellant. Rafferty testified as to his reasons for doing so, as follows:

"Q You are fully cooperating now, is that it, as your attorney advised you to, with the United States Attorney?

"A Yes, sir.

"Q Now, you were indicted, were you not, along with the indictment, United States of America v. Stanley Alvin Garelle, Kevin Patrick Rafferty, Howard Gerald Minkin. Were you one of the three defendants?

"A Yes, sir.

"Q But the indictment against you has now been disposed of, has it not, between you, your attorney and the United States Attorney? You have arranged for a plea to a lesser charge?

"A I am hoping for a plea to a lesser charge but no arrangement was made, sir.

"THE COURT: The records of this court show that the trial of this defendant and Garelle has been severed. The indictment has not been disposed of.

"MR FRIEDMAN: It has been severed.

"THE COURT: For separate trial.

"BY MR. FRIEDMAN:

"Q And you and Mr. Gaxelle, who hasn't testified yet, in exchange for testifying against Mr. Minkin are going to get a break." (Rep.Tr. 108-109).

"A Not true, sir.

* * * * *

"Q By your present cooperation you believe, do you not, that you are going to get probation on a lesser charge.

"A I wish I could be sure of that, sir.

"Q But you are cooperating.

"A I'm up here, sir. I wouldn't testify against a friend unless I was cooperating.

"Q You wouldn't testify against a friend to exchange five years for probation, five years of imprisonment for probation?

"A Sir, I don't know what you're getting at with me, but I haven't been guaranteed anything. I wish I could get a guarantee off somebody, but I haven't been guaranteed anything.

"I felt being apprehended with that amount of marijuana, it didn't do me any good to fight something I couldn't win.

"Q But this is a way out, is it not, to put the finger on another man who wasn't there.

"A Well, I had a conscience pang after I did it, and I spoke to my attorney in San Francisco who is a friend and he told me that he knows all the circumstances involved in the case and he told me I shouldn't feel morally wrong because Mr. Minkin was involved in it and he has got to take the chance just like everybody else, if he was involved in it, so I feel bad, but I felt I should cooperate.

"Q You don't have the slightest idea that you are probably going to get probation on a different charge at the proper time after testifying against Mr. Minkin? You don't know that?

"A I'm not certain of it, sir; I'm hoping for it.

"THE COURT: Let me say that whether

anybody gets probation or goes to jail rests with the Judge and not with anybody else.

"MR. FRIEDMAN: That is true, your Honor.

"BY MR. FRIEDMAN:

"Q But isn't it true that a different charge is going to be filed against you other than that listed in that indictment?

"A I'm not aware of it, sir.

"Q And that that charge does not carry with it the five-year mandatory prison sentence.

"A I think if you are referring to a tax act charge, I think that carries two to ten.

"Q The new charge.

"A I said, if you are referring to a tax act charge, that's a two to ten penalty, sir.

"Q And that's the one your hoping to get.

"A I would like to get it dismissed, sir. That's what I would like.

"Q You might get that, too; isn't that possible?

"A It's wholly improbable.

"Q If you cooperate.

"A How much can I cooperate?

"Q Like you're doing now." (Rep.

Tr. 110-112).

On November 16, 1965, an information was filed, in which Rafferty was charged with illegal importation of marijuana without the payment of tax in violation of United States Code, Title 26, Section 4755(a)(1), and Garelle was charged with aiding and abetting the commission of that offense. (R. 47). Both pleaded guilty and on January 4, 1966, were granted five years probation pursuant to United States Code, Title 18, Section 5010(a). (R. 42-43). The indictment in the case at bar was dismissed as to Rafferty and Garelle on the same day. (R. 41).

Questions Involved.

1. Does appellant's conviction of aiding and abetting violation of United States Code, Title 21, Section 176a, deny him due process of law in violation of the Fifth Amendment to the United States Constitution, because there is no reasonable basis of classification by which violation of that section can be distinguished from a violation of United States Code, Title 26, Section 4755(a)(1)? Does application to appellant of the mandatory minimum punishment for violation of United States Code, Title 21, Section 176a, deny him due process of law, because it is a penalty for

pleading not guilty and because vesting the United States Attorney with the arbitrary power to restrict the court in the matter of sentence is an unconstitutional delegation of legislative and judicial power to the executive branch of the Government? These questions are raised by appellant's indictment under United States Code, Title 21, Section 176a, the submission of the issue to the jury under the indictment, and the pronouncement of judgment pursuant to the mandatory provisions of United States Code, Title 21, Section 176a and Section 7237(d) of the Internal Revenue Code of 1954. (R.2-4, 28, Rep.Tr. 208-210, 253-255).

2. Was appellant denied due process of law in violation of the Fifth Amendment to the United States Constitution by the use against him of coerced testimony of his codefendants? This issue was raised by the reception in evidence of the testimony of appellant's codefendants, Kevin Patrick Rafferty and Stanley Alvin Garelle, although they did not voluntarily request to testify, but rather, as is shown by the evidence hereinabove set forth, were coerced to testify by the threat of the mandatory penalty under United States Code, Title 21, Section 176a, and the inducement that, if they gave testimony which satisfied the Government, they would be permitted to plead to a, "tax count". (Rep.Tr. 90 et seq., 129 et seq., 138 et seq.).

3. Did the trial court err in denying appellant's motion for exclusion of witnesses without considering the

matter on its merits? This issue is raised by appellant's motion for exclusion of witnesses. (Rep.Tr. 48).

SPECIFICATION OF ERRORS
(Rule 18-2(b))

1. The trial court erred in trying the case upon the indictment charging violation of United States Code, Title 21, Section 176a. (R. 2-4).

2. The trial court erred in submitting the case to the jury upon the charge contained in the indictment. (Rep.Tr. 208-210).

3. The trial court erred in sentencing appellant under the mandatory provisions of United States Code, Title 21, Section 176a and Section 7237(d) of the Internal Revenue Code of 1954. (R. 28, Rep.Tr. 253-255).

4. The trial court erred in severing the cases of Kevin Patrick Rafferty and Stanley Alvin Garelle from that of appellant. (R. 41).

5. The trial court erred in permitting Kevin Patrick Rafferty to testify as a witness. (Rep.Tr. 90 et seq., 138 et seq.).

6. The trial court erred in permitting Stanley Alvin Garelle to testify as a witness. (Rep.Tr. 129 et seq.).

7. The trial court erred in denying appellant's motion for exclusion of witnesses. (Rep.Tr 48).

ARGUMENT
(Rule 18-2(e))

Summary

United States Code, Title 21, Section 176a, and Title 26, Section 4755(a)(1), both proscribe the unlawful importation of narcotics. One carries a mandatory five year minimum penalty, while the other does not. Since both statutes prohibit the same conduct, the United States Attorney has the arbitrary power to choose between them. Appellant contends that the existence of such an arbitrary power denies him due process of law in violation of the Fifth Amendment to the United States Constitution. This arbitrary power permits the District Attorney to coerce guilty pleas and to punish pleas of not guilty by denying defendants who stand trial the opportunity for probation. He contends that his conviction in the case at bar is such punishment, and that it therefore denies due process of law. He also contends that delegation to the United States Attorney of the power, in his absolute discretion, to determine whether in a particular case the District Court will be permitted to grant probation, violates Article I, Section 1, and Article III, Section 1, of the Constitution.

The power to arbitrarily choose between Title 21, Section 176a, and Title 26, Section 4755(a)(1), also provides an instrument for coercion of defendant witnesses. That power was used in the case at bar to coerce appellant's

codefendants to testify against him. The process was facilitated by the action of the trial court in severing the cases. The United States Attorney was thereby enabled to withhold the reward of the lesser offense until after the codefendants had testified, thereby inducing them to believe that prosecution for the lesser offense depended upon their giving testimony favorable to the Government. Appellant contends that admission against him of evidence so obtained denied him due process of law.

Appellant also contends that the trial court erred in denying his motion for exclusion of witnesses. Although the granting of such a motion lies in the discretion of the court, in the case at bar the court abused its discretion by denying the motion without ascertaining any of the facts upon which such a ruling should be based.

I

APPELLANT'S CONVICTION OF AIDING AND ABETTING VIOLATION OF UNITED STATES CODE, TITLE 21, SECTION 176a, DENIES HIM DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THERE IS NO REASONABLE BASIS OF CLASSIFICATION BY WHICH VIOLATION OF THAT SECTION CAN BE DISTINGUISHED FROM A VIOLATION OF UNITED STATES CODE, TITLE 26, SECTION 4755(a)(1). APPLICATION TO APPELLANT OF THE MANDATORY MINIMUM PUNISHMENT FOR VIOLATION OF UNITED STATES CODE, TITLE 21, SECTION 176a, DENIES HIM DUE PROCESS OF LAW, BECAUSE IT IS A PENALTY FOR PLEADING NOT GUILTY, AND BECAUSE VESTING THE UNITED STATES ATTORNEY WITH THE ARBITRARY POWER TO RESTRICT THE COURT IN THE MATTER OF SENTENCE IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER TO THE EXECUTIVE BRANCH OF THE GOVERNMENT.

Appellant was convicted of aiding and abetting a violation of United States Code, Title 21, Section 176a.

That statute provides, in part:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner

Facilitates the transportation,
concealment, or sale of such
marihuana after being imported or
brought in, knowing the same to
have been imported or brought into
the United States contrary to law,
or whoever conspires to do any of
the foregoing acts, shall be im-
prisoned not less than five or
more than twenty years and, in
addition, may be fined not more
than \$20,000.00."

By virtue of another provision of Title 21, Section 176a,
and Section 7237(d) of the Internal Revenue Code of 1954,
appellant could not be granted probation.

As a result of the commission of the offense which
appellant was found to have aided and abetted, his codefen-
dants were convicted on guilty pleas of violating United
States Code, Title 26, Section 4755(a)(1). That section
provides:

"It shall be unlawful for any
person required to register and pay
the special tax under the provisions
of Sections 4751 to 4753, inclusive,
to import, manufacture, produce,
compound, sell, deal in, dispense,

distribute, prescribe, administer,
or give away marihuana without
having so registered and paid such
tax."

The penalty for a first offense violation of this section is not less than two nor more than ten years, and a fine of not more than \$20,000.00. Probation is permitted. (United States Code, Title 26, Section 7237). Both of appellant's codefendants were granted probation, while appellant received the mandatory minimum five year prison sentence. (R. 28, 42, 43).

The act which was the basis of the convictions of all three defendants was the attempt by Garelle and Rafferty to bring the marijuana through the Port of Entry without declaring it and without paying the tax on it. This one act necessarily violated both statutes. Moreover, insofar as the two statutes relate to importation of marijuana, it would be impossible to violate one without violating the other. One could not declare marijuana at the border and bring it in without registering and paying the tax. On the other hand, it would be impossible to register and pay the tax on smuggled marijuana. Thus, insofar as they relate to importation, the difference between the two laws is in the penalty prescribed for their violation. Thus, the two statutes, as applied here, vest in the United States Attorney the power to determine what sentence he will permit

the United States District Judge to impose for the commission of a particular unlawful act. Appellant submits that the statutes so applied deny him due process of law in violation of the Fifth Amendment to the United States Constitution, in a number of respects.

Due process requires equality of treatment under the law. Similar acts require similar punishments. While Congress may vest the trial court with discretion as to the extent of punishment in a particular case, so that the court may take account of individual differences in fashioning an appropriate sentence, any differences in the range of discretion permitted the court as to different defendants must rest upon some reasonable classification. Here, the three defendants were identically situated -- they were convicted of the same act. The trial judge found that the two codefendants were deserving of probation. That finding does not entitle appellant to probation. The court might have found that he did not deserve it. However, he was entitled to have the question of probation weighed in the same scales as his codefendants. The denial of that right, indeed of the right to have it weighed at all, was a denial of due process of law.

Although appellant and his two codefendants were indicted together, their cases were severed at the time of trial. During the trial the following occurred:

"MR. FRIEDMAN: There is one more

thing, your Honor.

"The United States Attorney and myself are discussing a possible adjustment of this case. May we have a short recess to discuss it?" (Rep. Tr. 126).

Whether or not this Court wishes to draw any inferences as to what happened during the recess, it is apparent that the reason that appellant was convicted of violating Title 21, U.S.C., Section 176a, while the others were convicted of violating Title 26, Section 4755(a)(1), is that they elected to plead guilty, while he decided to stand trial. It is surely a denial of due process to penalize a defendant for standing trial.

Some judges make a practice of punishing more severely defendants whom they believe to have testified falsely in their own defense. Because of the sanctity of the right to trial, we doubt the wisdom of this practice. However, even if such increased punishment is proper, the statutory scheme here involved does not achieve it, for the choice of punishments does not depend upon whether the defendant testifies falsely, or testifies at all, and it does not vest the discretion in the trial judge. The statutes, as here applied, constitute the imposition of an additional penalty for pleading not guilty rather than guilty. Appellant submits that such a result was never intended by

Congress and that it denies due process of law.

Article III, Section 1, of the Constitution vests the judicial power of the United States in the Supreme Court and such other courts as Congress may create. The imposition of sentence, within the limits fixed by Congress, is a judicial act. The fixing of the limits is a legislative act. Legislative power is vested in Congress by Article I, Section 1, of the Constitution. Appellant recognizes that it was within the power of Congress to fix five years imprisonment as the minimum penalty for the act of which he was found guilty, and to provide that a person so convicted could not be granted probation. However, because it adopted 26 U.S.C. 4755(a)(1), as well as 21 U.S.C. 176a, Congress did not adopt such a limitation. Moreover, it may not be assumed that Congress would have adopted the stringent penalties for violation of 21 U.S.C. 176a, if it had not known that the alternative of 26 U.S.C. 4755(a)(1) was available. Congress presumably intended that both sections should be utilized, but it probably never anticipated that the choice would be based upon whether or not a defendant pleaded guilty. Whatever the intent of Congress, however, the effect of the two statutes taken together is to delegate to the United States Attorney the power to determine the limits within which the District Court may act, a legislative function, and the ultimate power to determine the minimum sentence to be imposed, a judicial act. The unconstitutional delegation of

these powers to appellant's prosecutor is a violation of the separation of powers which is a cornerstone of our form of government and a denial of due process of law in violation of the Fifth Amendment to the Constitution.

II

APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY THE USE AGAINST HIM OF THE COERCED TESTIMONY OF HIS CODEFENDANTS. THE COERCION CONSISTED IN HOLDING OVER THE WITNESSES UNTIL AFTER THEY HAD TESTIFIED THE THREAT OF THE MANDATORY MINIMUM PENALTY FOR VIOLATION OF UNITED STATES CODE TITLE 21, SECTION 176a, ALTHOUGH THEIR CHARACTER AND OFFENSE MERITED CONVICTION OF VIOLATING UNITED STATES CODE TITLE 26, SECTION 4755(a)(1), AND A GRANT OF PROBATION WITHOUT CONFINEMENT.

In JACKSON vs. DENNO, 378 U.S. 368, 84 S.Ct. 1774, the United States Supreme Court held that due process was violated by a rule of law which permitted submission to a jury of an extrajudicial confession of a defendant, without a prior judicial determination that the confession was voluntary. The basis of the ruling was that, even if the jury was instructed to disregard a confession which they found to be involuntary, the procedure did not provide adequate protection against the possible use of an involuntary confession against the defendant.

In PEOPLE vs. UNDERWOOD, 61 Cal.2d 113, 37 Cal. Rptr. 313, the Supreme Court of California held:

"The same policy considerations which preclude the use of an involuntary statement of a defendant require that the prosecution be precluded from impeaching any witness by the use of an involuntary

statement given as the result of pressures exerted by the police. Such a statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crimes." (PEOPLE vs. UNDERWOOD, 61 Cal.2d 113, 124, 37 Cal.Rptr. 313, 319. See also California Evidence Code Section 1204, and the comment of the California Assembly Committee on Judiciary with reference thereto.)

Thus, the rule of JACKSON vs. DENNO, 378 U.S. 368, 84 S.Ct. 1774, applies to the extrajudicial statements of witnesses as well as those of the defendant on trial.

JACKSON vs. DENNO and PEOPLE vs. UNDERWOOD deal with extrajudicial statements. The case at bar concerns the testimony of witnesses in court. We must, therefore, consider whether the principle of JACKSON vs. DENNO and PEOPLE vs. UNDERWOOD is applicable to testimony in court.

The in-court analogue of JACKSON vs. DENNO is

disposed of by express constitutional provision. The Fifth Amendment provides, in part:

"No person. . .shall be compelled in any criminal case to be a witness against himself,"

The testimony of a defendant who testifies involuntarily is therefore inadmissible. The crux of the issue presently under discussion is whether the analogy of PEOPLE vs. UNDERWOOD is also applicable to exclude the coerced testimony of a defendant against his codefendant. Appellant respectfully submits that it is.

At common law a defendant in a criminal case was not a competent witness. The common law rule is abrogated for the federal courts by United States Code, Title 18, Section 3481, which provides:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This statute governs the admissibility of the testimony of a defendant against his codefendants. (ROWAN vs. UNITED STATES,

5 Cir. 1922, 281 Fed. 137, 139; UNITED STATES vs. BECK, 7 Cir. 1941, 118 F.2d 178, construing predecessors of the present statute). The statute cannot be circumvented by the expedient of severing the trials of codefendants jointly charged. Thus, if Garelle and Rafferty testified voluntarily and at their own request, their testimony was admissible. If, on the other hand, their testimony was coerced, the conditions of the statute were not met, and their testimony was inadmissible.

Garelle and Rafferty were subject to prosecution under either of two statutes. They were fully cognizant that one statute provided for a lesser penalty than the other and that one permitted the granting of probation, while the other did not. They were also aware of the possibility of a dismissal. Rafferty's and Garelle's cases were severed without any guarantee as to which option the United States Attorney would adopt. Rafferty clearly expressed his understanding that the United States Attorney's choice would depend upon the extent to which he, "co-operated".

"A I would like to get it dismissed, sir. That's what I would like.

"Q You might get that, too; isn't that possible?

"A It's wholly improbable.

"Q If you cooperate.

"A How much can I cooperate?"

(Rep.Tr. 112).

Otherwise stated, Rafferty believed he did not have the price of an outright dismissal, but that by his testimony he might buy a tax count.

Of course, the testimony of a codefendant is not rendered inadmissible merely because he entertains the hope that he will benefit by testifying. However, where the hope is induced by the prosecution, the testimony is coerced and inadmissible. Appellant submits that the practice adopted by the United States Attorney of postponing until after the codefendants have testified the decision as to which statute he will invoke, has, and is intended to have, the effect of inducing the defendant-witness to believe that avoidance of the mandatory penalty prescribed by United States Code, Title 21, Section 176a, is contingent upon his giving testimony favorable to the Government.

During Rafferty's testimony the trial court said:

"THE COURT: Let me say that whether anybody gets probation or goes to jail rests with the Judge and not with anybody else." (Rep.Tr. 111).

This statement is not accurate, because the court cannot grant probation under United States Code, Title 21, Section 176a. Moreover, taken with the action of the court in severing the cases, the statement clearly suggested that the

court approved the mode of procedure adopted by the United States Attorney and would cooperate in meting out the rewards or punishments which the U. S. Attorney thought the testimony merited.

MIRANDA vs. ARIZONA, 384 U.S. 438, 86 S.Ct. 1602, and the cases leading up to it, have been criticized for applying the standards of the courtroom to the police station. However, we know of no suggestion that courtroom standards are lower than those applied to the police by MIRANDA. We submit that the coercive influences which the Supreme Court sought in MIRANDA to eliminate from custodial interrogation are as nothing compared with the coercion applied to the witnesses in the case at bar. As any lawyer who has represented clients confronted with this procedure knows, Garelle and Rafferty literally had no choice but to testify for the prosecution. The fact that express verbal promises are piously avoided by the Government does not reduce the expectation that testimony favorable to the prosecution will produce the result which it produced in the case at bar. It merely reinforces the belief that the Government's ultimate choice between tax count and smuggling will be based, not upon the intrinsic merit of the case against the testifying defendant, which the Government could evaluate before trial, and which it necessarily does evaluate without trial when all defendants plead guilty, but rather upon the character of the testimony given.



The coercive effect of the procedure adopted in the case at bar is both unique and unnecessary. California deals with the situation presented here by providing by statute for dismissal against a codefendant so that he may testify against another defendant. (California Penal Code Sections 1099, 1101). The District of Columbia has a similar statute. (Section 23-110 D.C. Code 1951, CARRADO vs. UNITED STATES, 210 F.2d 712, 718). Although there appears to be no analogous federal statute, a similar procedure would be authorized under Rule 48 of the Federal Rules of Criminal Procedure. Alternatively, Garelle and Rafferty could have been permitted to plead guilty to the tax count before they testified. Either of these approaches would have avoided the coercive effect of putting in the hands of the prosecutor the power to determine the punishment of the witnesses on the basis of the testimony given. The failure to adopt either of them, or some other efficacious procedure, resulted in appellant's conviction on coerced testimony. A conviction so obtained denies due process of law in violation of the Fifth Amendment to the United States Constitution. The judgment must therefore be reversed.

III

THE TRIAL COURT EITHER FAILED TO EXERCISE OR ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE WITNESSES, BECAUSE THE COURT FAILED TO CONSIDER CIRCUMSTANCES CALLING FOR EXCLUSION AND BECAUSE THE CIRCUMSTANCES MAKE REFUSAL TO EXCLUDE AN ABUSE OF DISCRETION.

At the outset of the trial, the following occurred:

"MR. FRIEDMAN: May we have an order of exclusion of the witnesses here? I don't know who are going to be witnesses, but I would like to have excluded any witness other than the party testifying.

"THE COURT: Motion denied."

(Rep.Tr. 48).

In WILLIAMSON vs. UNITED STATES, 310 F.2d 192 (1962) 198, this Court said:

"The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended, particularly where the testimony of the witness is any measure cumulative or corroborative. It is nonetheless the uniform federal rule, prevailing also in a majority of the states,

that a motion to sequester is addressed to the discretion of the trial court."

In the case at bar the trial judge denied the motion out of hand, without consideration of whether the testimony to be offered would be cumulative or corroborative, or any other factor bearing upon the exercise of discretion. The statement of appellant's counsel made it clear that he lacked sufficient knowledge of the Government's case to make a showing in that regard. The duty of the court was to inquire of counsel for the Government as to facts which might make the granting of the motion appropriate. By ruling without ascertaining the facts, the trial court foreclosed itself from exercising the discretion conferred upon it.

The substantial issues in the case at bar revolved about the credibility of Garelle and Rafferty and the circumstances under which they implicated appellant and Rafferty telephoned appellant from the Customs House. The circumstances in which appellant's codefendants found themselves at the time they testified tended, to say the least, to provide motivation for them to color their testimony. The Government called the customs officials to testify before it called the codefendants. We submit that if ever a refusal to exclude witnesses could be regarded as an abuse of discretion, it must be so regarded in this case. The error was prejudicial and requires reversal.

CONCLUSION

Appellant contends that the trial court committed prejudicial error in denying his motion for the exclusion of witnesses without exercising its discretion on the merits. The ruling on this point was especially prejudicial, since appellant's conviction was predicated upon the testimony of alleged accomplices whose testimony was coerced and who therefore had a motive for coloring their testimony to conform to that given by witnesses who preceded them. Far more serious are the grave constitutional issues raised by the Congressional enactment of the different penalties for commission of the same act under United States Code, Title 21, Section 176a, and Title 26, Section 4755(a)(1), and their application to appellant in the case at bar to determine his penalty and to coerce his codefendants to testify against him. The latter questions are important to appellant, but they are also of general importance. They are important to the members of the bar who defend this type of cases. One day we must explain to a client that, although there is a doubt that the Government can prove the case against him, or a question of law as to his guilt, he cannot afford to take the risk of a defense on the merits. Another time we perform the ritual of obtaining a non-promise of a tax count if our defendant testifies, and the chore of advising the client as to the moral code of the informer. (See Rep.Tr. 110-111). We can rarely adequately

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident. The author argues that the scientific aspect of the problem is more important than the philosophical aspect. He shows that the scientific aspect of the problem is a more difficult one to solve than the philosophical aspect. He also shows that the scientific aspect of the problem is a more interesting one to solve than the philosophical aspect. The author concludes that the scientific aspect of the problem is the one that should be given priority in the study of the origin of life.

APPENDIX -- EXHIBIT PART OF RECORD
(Rule 18-2(f))

	Identified	Offered and Received
Plaintiff's Exhibit 10	151	151



N O. 2 0 9 1 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

JAN 4 1997

WM. B. LUCK, CLERK

N O. 2 0 9 1 8
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN,

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vs.

UNITED STATES OF AMERICA,

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in one count of a two-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was tried under a two-count indictment which also included Kevin Patrick Rafferty and Stanley Alvin Garelle as named co-defendants. Count One of the indictment alleged that Garelle, Rafferty, appellant Minkin, and divers other persons to the Grand Jury unknown, agreed, confederated, and conspired together to commit the offenses of knowingly, with intent to defraud the United States, importing, bringing into the United States, smuggling, and clandestinely introducing marihuana, without presenting such marihuana for inspection and without entering and declaring it, and concealing and facilitating the concealment and transportation of marihuana which had been imported into the United States contrary to law, such conspiracy being in violation of Title 21, United States Code, Section 176a. One overt act was alleged [C. T. 2-3]. ^{1/}

Count Two alleged that defendant Rafferty, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 79 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, and that appellant and defendant Garelle knowingly aided, abetted, counseled, induced,

^{1/} "C. T. " refers to the Clerk's Transcript of Record.

and procured the commission of that offense [C. T. 4].

Appellant was tried alone [C. T. 40]. His jury trial commenced on November 2, 1965, before United States District Judge James M. Carter [R. T. 42, 47]. 2/ Count One was withdrawn from the jury [R. T. 167-68]. Appellant was found guilty as charged in Count Two of the indictment on November 3, 1965 [R. T. 226-27].

Thereafter, on February 7, 1966, appellant was committed to the custody of the Attorney General for five years [C. T. 28]. He subsequently filed notice of appeal [C. T. 29].

III

Appellant alleges the following points upon appeal:

"1. The trial court erred in trying the case upon the indictment charging violation of United States Code, Title 21, Section 176a.

"2. The trial court erred in submitting the case to the jury upon the charge contained in the indictment.

"3. The trial court erred in sentencing appellant under the mandatory provisions of United States Code, Title 21, Section 176a and Section 7237(d) of the Internal Revenue Code of 1954.

"4. The trial court erred in severing the cases of Kevin Patrick Rafferty and Stanley Alvin Garelle

2/ "R. T. " refers to the Reporter's Transcript of Proceedings.

from that of appellant.

"5. The trial court erred in permitting Kevin Patrick Rafferty to testify as a witness.

"6. The trial court erred in permitting Stanley Alvin Garelle to testify as a witness.

"7. The trial court erred in denying appellant's motion for exclusion of witnesses. " [From Appellant's Opening Brief, p. 27, omitting references to Transcript pages.]

IV

STATEMENT OF THE FACTS

In April 1965, appellant agreed to furnish \$1200 for a marihuana-smuggling venture involving Kevin Rafferty and Stanley Garelle. Rafferty had made a profit of about \$1200 on a previous marihuana-smuggling trip, but he was destitute, having lost a subsequent load of marihuana in the mountains east of Tecate, Mexico [R. T. 91-93, 106-08].

After the agreement was made, appellant paid \$720 to Rafferty, including about \$400 on the night before Rafferty left San Francisco on the trip [R. T. 94, 103]. Rafferty and Garelle left San Francisco in Rafferty's Ford on approximately May 3 and traveled to San Diego, where Rafferty picked up \$130 that appellant had deposited in a bank for him. They drove through Mexicali to Culiacan, where they purchased a quantity of marihuana for \$650.

They returned to the United States on May 12, entering the country from Tijuana at San Ysidro, California. The marihuana was in the trunk of the vehicle. They declared no merchandise [R. T. 59-60; 95-98; 102].

The marihuana was found by an Immigration inspector at the port of entry [R. T. 51-52, 57, 59, 61]. The total weight was approximately 79 pounds [R. T. 67].

Rafferty and Garelle were arrested. They had previously agreed that if they were arrested, "we would zip our lips and not say a word", but after Rafferty thought about the five-year sentence, he talked to Garelle "and we gave Hyman up" [R. T. 109-10]. Rafferty told Customs Agent Thaine Ellis that Hyman Minkin (appellant) was involved in the matter. He agreed to make a telephone call to appellant. Agent Ellis promised Rafferty nothing in return [R. T. 83].

Agent Ellis listened during the subsequent telephone conversation between Rafferty and appellant. Rafferty told appellant that he had gotten the "stuff" or "grass". Appellant replied, "Mazeltoff", meaning "congratulations" or "good luck". Rafferty said that he was stuck in San Diego and asked for the remainder of the money that had been promised. Appellant stated that he had already sold the marihuana, meaning that it could be disposed of as soon as Rafferty reached San Francisco. He said that he would put a couple of hundred dollars in Rafferty's bank account [R. T. 127-28, 140-41, 143].

Rafferty and Garelle testified at the trial [R. T. 90, 129].



Rafferty stated that he was hoping for probation but had not been guaranteed anything. Garelle stated that he had no "arrangement" with the prosecution and that he was not promised anything like a lesser penalty [R. T. 110-11, 136-37].

Appellant testified that he had no connection with the smuggling venture. He admitted that he paid Rafferty \$130 on May 5, but claimed that it was a repayment for a loan previously made by Rafferty. He admitted that he knew that Rafferty was planning to bring marihuana back from Mexico. He stated that during the May 12 telephone conversation with Rafferty the latter said, "I have got the grass" (meaning "marihuana") [R. T. 115-16, 118, 122-23, 127]. Appellant also admitted that he borrowed \$200 and placed it in Rafferty's bank account on May 13, the day after the arrest and telephone conversation [R. T. 120, 123].

V

ARGUMENT

- A. THE TRIAL COURT DID NOT COMMIT ERROR IN TRYING THE CASE AND SUBMITTING IT TO THE JURY UNDER 21 U.S.C.A. 176a AND IN SENTENCING UNDER THAT STATUTE.
-

Appellant contends that the trial Court committed error in trying the case under Title 21, United States Code, Section 176a; in submitting it to the jury under that statute; and in sentencing appellant under that statute.

More specifically, appellant asserts that (a) he was denied due process of law because the United States Attorney had the arbitrary power to choose between different statutes which "prohibit the same conduct . . ."; ^{3/} (b) he was denied due process of law because co-defendants who testified against appellant were induced "to believe that prosecution for the lesser offense depended upon their giving testimony favorable to the Government"; and (c) there was a violation of the requirement of separation of powers and an unconstitutional delegation of legislative and judicial power to the executive branch of the Government.

Having failed to raise any of these issues in a timely manner in the trial Court, appellant is precluded from raising them in this appeal.

Ramirez v. United States, 294 F.2d 277, 283

(9th Cir. 1961);

Stein v. United States, 166 F.2d 851, 855

(9th Cir. 1948), cert. den. 334 U.S. 844

(1948).

An exception to this rule is applicable where "plain error" has occurred. Rule 52(b), Federal Rules of Criminal Procedure. It is respectfully submitted that appellant's contentions do not involve "plain error". It may be assumed that an exception also lies if it is claimed that the conviction occurred under a statute that is unconstitutionally void, but it is doubtful that appellant is

^{3/} Appellant's Opening Brief, p. 28.



asking this Court to strike down Section 176a.

Assuming, arguendo, that the objection may be raised in this Court, appellant was not denied due process of law because the United States Attorney allegedly had the arbitrary power to choose between different statutes prohibiting the same conduct.

The statutes do not prohibit the same conduct. Appellant was convicted of having violated Title 21, United States Code, Section 176a, by aiding, abetting, etc., the illegal importation of marihuana [C. T. 4, 25]. Rafferty was convicted of illegal importation of marihuana without payment of tax, in violation of Title 26, United States Code, Section 4755(a)(1). Garelle was convicted of aiding and abetting a violation of the same statute, 26 U. S. C. A. 4755(a)(1) [C. T. 42-43].

The latter statute [26 U. S. C. A. 4755(a)(1)] prohibits the importation, manufacture, etc. of marihuana without registering and paying the special tax under 26 U. S. C. A. 4751 to 4753, inclusive.

26 U. S. C. A. 4755(a)(1).

This involves an annual \$24 tax to be paid by marihuana importers, manufacturers, etc.

26 U. S. C. A. 4751.

However, appellant was charged with aiding abetting, etc., the smuggling and clandestine introduction of marihuana, "which marihuana should have been invoiced", and the importation of marihuana "contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by



United States Code, Title 19, Sections 1459, 1461, 1484 and 1485 . . . " [C. T. 4, emphasis added].

The references to Sections 1484 and 1485 of Title 19 involved immaterial surplusage in this case, as the principal, Rafferty, was not a consignee.

Current v. United States, 287 F.2d 268, 269
(9th Cir. 1961).

The relevant statutes are 19 U. S. C. A. 1459 and 19 U. S. C. A. 1461. Section 1459 provides in pertinent part that the person in charge of a vehicle must report his arrival and produce a manifest if merchandise is aboard. Section 1461 provides that merchandise imported or brought in from any contiguous country shall be unladen in the presence of a Customs officer. These are the statutes involved in the count under which appellant was convicted. While Rafferty and Garelle were convicted of importation without registering and paying the annual tax, appellant was convicted of aiding, abetting, etc., the smuggling of marihuana, which marihuana should have been invoiced, and the importation of marihuana contrary to law in that it was not presented for inspection, entered, and declared. It is clear that the two statutes do not involve identical offenses.

"Even the same act may constitute two separate offenses, especially if the offenses are created under separate statutes. The test laid down in numerous cases is whether an additional fact or facts must be proven in one case than in the other."

[citing numerous cases].

Silverman v. United States, 59 F.2d 636, 637

(1st Cir. 1932), cert. den. 287 U.S. 640

(1932).

The additional fact in the cases of Rafferty and Garelle was failure to register and pay the annual tax; the additional fact in appellant's case was failure to invoice the marihuana and present it for inspection. Consequently, the two offenses are not identical. Appellant is incorrect in stating that "it would be impossible to register and pay the tax on smuggled marihuana" (Appellant's Opening Brief, p. 32). The tax is an annual tax.

26 U.S.C.A. 4751.

There is no evidence in the record to sustain appellant's contention that he was punished for pleading not guilty.

Appellant also complains that the co-defendants, who testified upon behalf of the prosecution, received probation, while appellant received a prison sentence.

A similar argument was rejected by the Supreme Court of the United States in Lisenba v. California, 314 U.S. 219, 227 (1941):

"There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate."

In Marcella v. United States, 285 F.2d 322, 324 (9th Cir. 1960), cert. den. 366 U.S. 911 (1961), the opinion of this Court stated:

"Appellant urges that he was 'in the same class' as both the unindicted conspirators and the two indicted and convicted conspirators. As a law violator, that statement is true--all violated the law. But that does not mean there is no discretion in a prosecutor as to whom he will charge; whom he will indict; whom he will permit to turn state's evidence; to whom, if any, he will grant immunity. The traitor or 'turncoat,' or 'squealer,' or 'stool pigeon' is universally disliked; it is regrettable that the use of such aids to law enforcement are required, yet for some reason it is seldom the noble and respectable citizen who has had a sufficient contact with the traffic in narcotics to enable him to bring his good character to the witness stand--there to testify and describe the transactions charged."

In the determination of the sentence to be imposed, the Court may consider a defendant's assistance to the Government. This does not amount to a penalty upon others for pleading not guilty.

United States v. Vita, 209 F. Supp. 172, 174
(E. D. N. Y. 1962).

Appellant also argues that the testimony of Garelle and Rafferty was coerced and induced by the belief that they would benefit from their testimony. The record does not support this contention. Rafferty testified that he was hoping for probation but had not been guaranteed anything, and Garelle testified that he was not promised anything like a lesser penalty [R. T. 110-11, 136-37].

If Rafferty and Garelle testified in the hope of gaining some benefit, this was not a violation of appellant's Constitutional rights:

"The fact that Contreras may have hoped for leniency affected only the weight which the jury should accord to his testimony. "

Diaz-Rosendo v. United States, 357 F.2d 124, 130
(9th Cir. 1966).

"Parenthetically we note that the cooperation of one of several joint defendants in the prosecution of others, in the hope of saving his own skin, is as old as law itself. It seems one part of the unpleasant situation that goes with, and is an integral part of crime, seemingly a necessary part of crime's solution and prosecution and ultimate control, if not prevention. "

United States v. Marchese, 341 F.2d 782, 799
(9th Cir. 1965), cert. den. 382 U. S. 817
(1965).

In Audett v. United States, 265 F.2d 837, 847 (9th Cir. 1959), cert. den. 361 U.S. 815 (1959), this Court quoted Wigmore with approval as follows:

" 'The promise of immunity, then, being the essential element of distrust, but not being invariably made, no invariable rule should be fixed as though it had been made. Moreover, if made, its influence must vary infinitely with the nature of the charge and the personality of the accomplice. Finally, credibility is a matter of elusive variety, and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be distrusted. ' "

Appellant's suggestion that hopes of leniency must lead to perjury is contradicted by the experience of the instant case. Garelle, who was in practically the same legal position as Rafferty, and whose testimony also is attacked as allegedly coerced, provided so little assistance to the Government that appellant's counsel stated that Garelle "couldn't even bolster his fellow confederate, Mr. Rafferty" [R. T. 176] and also stated that "We don't have any corroboration by Mr. Garelle . . . he doesn't give anything in support . . ." [R. T. 186].

In Diaz-Rosendo, supra, appellant Fernandez argued as follows:

"No conviction should be permitted to stand



predicated in part on the testimony developed and illicit from an alleged co-defendant and co-conspirator who . . . was permitted to plead to a tax count and receive a straight probation sentence and whose testimony appears impeached. . . ." 4/

With slight variation in terminology, Fernandez was raising the same issue raised by appellant herein, contending that the conviction should not be permitted to stand. This Court affirmed the conviction.

Diaz-Rosendo, supra, at p. 130.

In regard to appellant's claim of violation of separation of powers, there was no greater delegation of authority to the prosecution than exists in any other case involving mandatory penalties and alternative statutes that might be involved in a plea of guilty to a lesser charge. Appellant implies that he could have had a lesser charge without a mandatory penalty had he pleaded guilty. This Court has stated:

"A guilty defendant must always weigh the possibility of his conviction on all counts, and the possibility of his getting the maximum sentence,

4/ Opening Brief of Appellant Felix Anenson Fernandez, p. 57 (No. 19765). This quotation does not appear in the Court's opinion, but it is permissible to refer to appellate briefs to determine whether certain matters were considered in a previous appeal.

Murphy v. Waterfront Comm'n., 378 U.S. 52, 71 (1964).

against the possibility that he can plead to fewer, or lesser, offenses, and perhaps receive a lighter sentence."

Cortez v. United States, 337 F.2d 699, 701

(9th Cir. 1964), cert. den. 381 U.S. 953

(1965).

B. THE DENIAL OF THE MOTION TO
EXCLUDE WITNESSES DID NOT CON-
STITUTE AN ABUSE OF DISCRETION.

Recognizing that a motion to exclude witnesses rests in the discretion of the trial court, appellant asserts that there was a failure to exercise discretion because the trial Court did not inquire concerning the facts. However, if appellant wanted a full hearing upon the question of exclusion of witnesses, he should have requested it. He did not do so.

In Charles v. United States, 215 F.2d 825 (9th Cir. 1954), there was an abuse of discretion because the trial judge had a preconceived determination to deny all requests for exclusion of witnesses (at p. 827). This is not the case in the instant appeal.

Even though an abuse of discretion was found in Charles, supra, there was no reversible error:

"However, the record does not show that any witness was in the courtroom while any other witness was testifying. We therefore cannot say that appellant was prejudiced by the District Court's refusal to put the witnesses under the rule or by its failure to exercise

its discretion." (emphasis added.)

Here, as in Charles, the record does not show that Rafferty and Garelle were in the courtroom at the time that Agent Ellis testified, nor that Garelle was present when Rafferty testified. Consequently, assuming, without conceding, that error occurred, it was not reversible error.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
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NO. 20924 ✓

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, for a violation of Title 18, United States Code, Section 2114, armed robbery of a Postmaster (Wagner v. United States, 264 F. 2d 524 [9th Cir. 1959]). Following a jury trial, the appellant and his two co-defendants were sentenced to the custody of the Attorney General for twenty-five years (Wagner, id.). An appeal was taken from the above conviction and the conviction affirmed (Wagner, id.).

Appellant filed the subject §2255 motion on October 25, 1965 [C. T. 2]. ^{1/} Following an Order on Motion Pursuant to 28 U. S. C. §2255

^{1/} "C. T. " refers to Clerk's Transcript.



filed and entered on November 2, 1965 [C. T. 20], the appellant filed a motion for reconsideration on December 20, 1965 [C. T. 22]. Said Motion for Reconsideration was denied by an Order of December 20, 1965 [C. T. 31]. On January 10, 1966, a Notice of Appeal was filed from the orders of November 2, 1965 and December 20, 1965 [C. T. 31].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2114 and 3231, and Title 28, United States Code, Section 2255.

If this Court has jurisdiction, then it lies pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . , or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the



sentence. . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus.

. . . . "

III

STATEMENT OF THE CASE

A. Questions Presented

1. Whether this Court has jurisdiction of the instant appeal.
2. Whether appellant may raise his substantive issues in light of the fact the same issues were raised on the direct appeal from his conviction, to wit:
 - a. Exclusion at trial of a teletype report.
 - b. Denial by the trial court of the request to inspect certain reports; and
 - c. Failure of the District Court to order the production of the name and address of "the 7-UP man".

B. Statement of Facts

On the afternoon of December 19, 1955, at about the hour of 2:30 P. M. Assistant Postmaster Bonner and Postmaster Martin left the Post Office at Bellflower to deposit postal funds and checks

in a bank at Bellflower, California [R. T. 104]. 2/ They proceeded from the Post Office in a Pontiac station wagon driven by Postmaster Martin. Martin was armed [R. T. 105]. They parked the station wagon in a parking lot to the rear of the bank. Immediately upon stopping the auto and when they, Bonner and Martin, started to get out of the car they were accosted: "a man accosted Martin with a gun . . . " [R. T. 106-107]. Bonner testified that he could not identify the man who accosted Martin with a gun [R. T. 107]. Postmaster Martin identified such person as co-defendant Vandergrift [R. T. 254-255]. Martin testified that this person, Vandergrift, " . . . approached on my side and stuck a gun in my side and demanded my gun" [R. T. 254]. That this person, Vandergrift, was also reaching in on the right side of Martin's coat trying to get his, Martin's gun [R. T. 255]. "So (Martin) I reached into the left to give him my gun, and at that time he pushed the gun into my ribs and told me to keep my hand out if I didn't want to get shot" [R. T. 255]. Martin testified that he was apprehensive of his life and that he felt his assailant meant business [R. T. 255]. That his shirt had a rip in it where the gun had jammed into his ribs [R. T. 256].

Bonner testified that the man on his side of the auto also had a gun [R. T. 107]. That this person demanded the money. This person, Bonner identified as the appellant Wagner [R. T. 108]. Bonner testified that he was certainly apprehensive of his life and

2/ "R. T. " refers to Reporter's Transcript.

was in fear when the gun was pointed at him and that he believed the men meant business [R. T. 109]. Bonner testified that the "man", "Wagner", took the money, that the two of them went to the rear of their car and then later came in front of their car, crossed the street and got in the get-away car that was double parked across the street on Maple Street, headed east [R. T. 109]. This car was described as a dirty-colored Oldsmobile. Assistant Postmaster Bonner stated he saw the driver of the get-away car very clearly, whom he identified as the co-defendant Cambiano [R. T. 110]. Postmaster Martin likewise identified Cambiano as the driver of the get-away car [R. T. 259-260].

Witness Bonner stated that there was a "7-UP" truck double parked on the street at the time they (he and Martin) went into the parking lot [R. T. 149]. That he later talked to the driver of this truck [R. T. 150]. That the "7-UP" man gave to him, Bonner, the license number of the get-away car [R. T. 178].

The Witness Robert Hunt stated that he was an insurance agent. That on December 19, 1955, he had parked his automobile on Maple Street [R. T. 226]. This car was parked on the opposite side of the street from Mr. Hunt's office. That he had gone to his car that afternoon and attempted to start his car when a man with a money sack or a brown canvas bag in one hand and a gun in the other appeared to the right of his car [R. T. 227]. Witness Hunt identified this person as the defendant Vandergrift [R. T. 228]. That this person was close to him, about four or five feet -- that he had blue eyes [R. T. 229]. Hunt described the get-away car as

a " '50, '51, oxidized, badly oxidized Oldsmobile, four-door sedan" [R. T. 229]. Hunt observed the driver of this car and identified him as defendant Cambiano [R. T. 230]. Upon cross-examination, he again identified Cambiano and gave a description of him as he remembered him [R. T. 242]. The witness Hunt conceded that his identification of Vandergrift was "doubtful" [R. T. 238]. Hunt made no attempt to identify appellant Wagner; he testified: "Another man crossed behind the first man, which I did not get a good look at" [R. T. 230].

Postmaster Martin identified Vandergrift as the person who approached his side of the car " . . . and stuck a gun in my side and demanded my gun" [R. T. 254-255]. Martin also identified Wagner as the person he observed on the opposite side of the car. " . . . I glanced over to my Assistant Postmaster and I noticed that another man was over there with a gun at his head" [R. T. 257]. That this person did not then have a mask on [R. T. 257]. Witness Bonner had testified that the mask over a part of Wagner's face had slipped down [R. T. 140]. Witness Martin also identified Cambiano as the driver of the car that the robbers used to make their get-away [R. T. 260].

IV

SUMMARY OF THE ARGUMENT

Appellant has affixed new legal labels to grounds that were raised in the appeal from his conviction to this Court.

The Notice of Appeal filed as a result of the denial of appellant's 2255 motion was filed outside of the sixty day limit set by Rule 73(a) of the Federal Rules of Civil Procedure.

The substantive grounds urged in the instant motion have been raised and ruled upon in appellant's direct appeal from his conviction.

The ground relating to exclusion of the teletype report is now couched in terms of causing a surprise to his counsel tantamount to rendering him, Morris Lavine, ineffective. A cursory examination of appellant's opening brief shows that this issue has been abandoned.

The subject motion phrases the denial of the request to inspect reports ground in terms of being denied the effective assistance of counsel. This ground has apparently been abandoned on appeal.

The denial of the trial court to direct the production of the name and address of "the 7-UP man" is now couched in terms of the willfull suppression of evidence.

ARGUMENT

A. THIS COURT HAS NO JURISDICTION
OF THE INSTANT APPEAL.

The order on motion pursuant to 28 U.S.C. §2255 was filed and entered on November 2, 1965 [C.T. 20]. The Notice of Appeal was filed on January 10, 1966 [C.T. 31].

On December 20, 1965, there was filed a motion to reconsider the earlier denial of relief [C.T. 22].

" . . . An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. . . . "

Title 28, United States Code, Section 2255.

"In a habeas corpus proceeding before a circuit court or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. . . . "

Title 28, United States Code, Section 2253.

Rule 73(a) of the Federal Rules of Civil Procedure requires in part:

" . . . in any action in which the United States or an officer or agency thereof is a party, the notice



of appeal may be filed by any party within 60 days from such entry [of judgment]; . . . "

The motion to reconsider is not such an action as would postpone the date for the filing of a notice of appeal. Liberally construing the motion to reconsider, it may be categorized as a Rule 60(b) motion based on "any other reason justifying relief from the operation of the judgment".

Rule 60(b) also provides:

"A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation "

It may be argued that the motion to reconsider was in reality a motion pursuant to either Rule 50(b) or Rule 59 of the Federal Rules of Civil Procedure. Such motions, however, must be made within ten days of the entry of judgment, and, therefore, the motion to reconsider can be neither of said motions.

The notice of appeal was simply filed too late.

B. THE DISTRICT COURT'S JUDGMENT
SHOULD BE AFFIRMED BECAUSE NO
GROUNDS ARE RAISED IN THE INSTANT
PROCEEDING WHICH WERE NOT RAISED
ON APPEAL.

Assuming, arguendo, that this Court has jurisdiction of the instant appeal, the grounds urged in the instant proceeding were raised and ruled upon in the appeal from appellant's conviction. (Wagner, supra.) Appellant has merely changed the legal label by which he refers to each ground. In the language of Sanders v. United States, 373 U.S. 1 (1963), appellant is supporting identical grounds by different legal arguments. The Court's attention is directed to Sanders, at p. 16, for a complete and familiar explanation of the meaning of "ground".

To quote Judge Byrne in the instant matter,

"The ground of attack upon the judgment and sentence, as pleaded in the motion, is that the evidence adduced at the trial is not sufficient to identify the petitioner as a participant in the robbery; that the court erred in the admission of certain evidence, and further erred in failing to require the production of certain evidence; and

"It appearing to the court that questions as to the sufficiency of the evidence or involving errors, whether of law or of fact, must be raised by timely appeal from the sentence if the petitioner desires to raise them, and may not be considered in a Section

2255 proceeding.

"Hastings vs. U.S. (CA 9) 184 F.2d 939;

"Tucker vs. U.S. (CA 9) 225 F.2d 271;

"Brule vs. U.S. (CA 9) 240 F.2d 589;

"Black vs. U.S. (CA 9) 269 F.2d 38, 41-42;

"U.S. vs. Angelet (CA 2) 255 F.2d 383, 385.

"Indeed, in this case it appears that the petitioner did raise the questions on appeal from the sentence.

See

Wagner vs. U.S. , (CA 9) 264 F.2d 524.

"The files and records of the case conclusively show that the petitioner is entitled to no relief." [C. T. 30-31].

The motion to reconsider [C. T. 22], merely expands upon, and explains, appellant's position vis a vis "the 7-UP man".

When appellant originally raised the ground relating to "the 7-UP man" this Court held:

"Where a witness is equally available to both parties no inference should be drawn from the failure to produce such a witness. Shurman v. United States, 5 Cir. , 223 F.2d 272, 275. On like reasoning, where the name and address of a witness is equally available to both parties, no prejudice results from the denial of a motion requiring one party to supply that information to the other."

Wagner at 531.

In reference to the ground relating to the inspection of certain reports, this Court earlier held that the denial was proper because of an untimely demand and there was no proper foundation. Wagner at 532-533.

In reference to the ground urged pertaining to the teletype report this Court held that the conviction was supported by substantial evidence that Wagner was one of the robbers. Technically, appellant's present argument is addressed to the exclusion from evidence of a certain teletype report. Clearly, the admission or exclusion of evidence is not a collateral matter to be raised in a 2255 motion. Hastings, supra.

While Wagner is not raising the propriety of the instructions in his 2255 Motion, his co-defendant Cambiano did. Cambiano v. United States, 295 F.2d 13 (9th Cir. 1961). In affirming the judgment of Judge Byrne on Cambiano's earlier 2255 motion, this Court said:

"In the first place, errors in instructions must be corrected on appeal and may not be reached in a proceeding under Section 2255. Baules v. United States, 9 Cir., 1958, 258 F.2d 318. Secondly, judgment of conviction was appealed and the instructions which were given in the case were approved by this Court in Wagner v. United States, 9 Cir., 1959, 264 F.2d 524. "

295 F.2d at 14.

It is apparent that the same reasoning applies to the teletype, "the 7-UP man", and reports of various agents.

CONCLUSION

There being no error in the denial of appellant's motion,
the judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow

RONALD S. MORROW



NO. 20926 /

See Vol.
3377

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY ALLAN WOLFE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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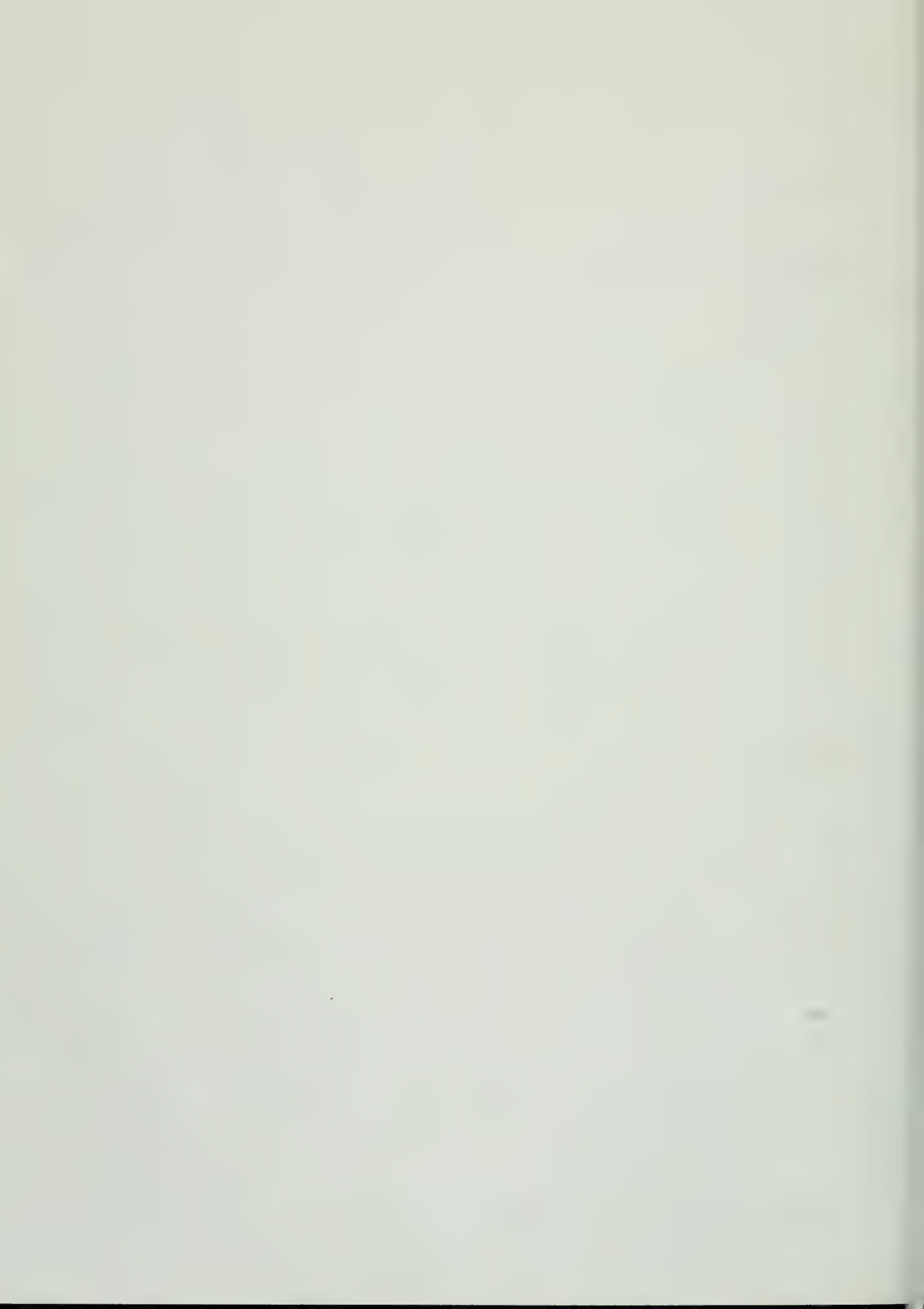
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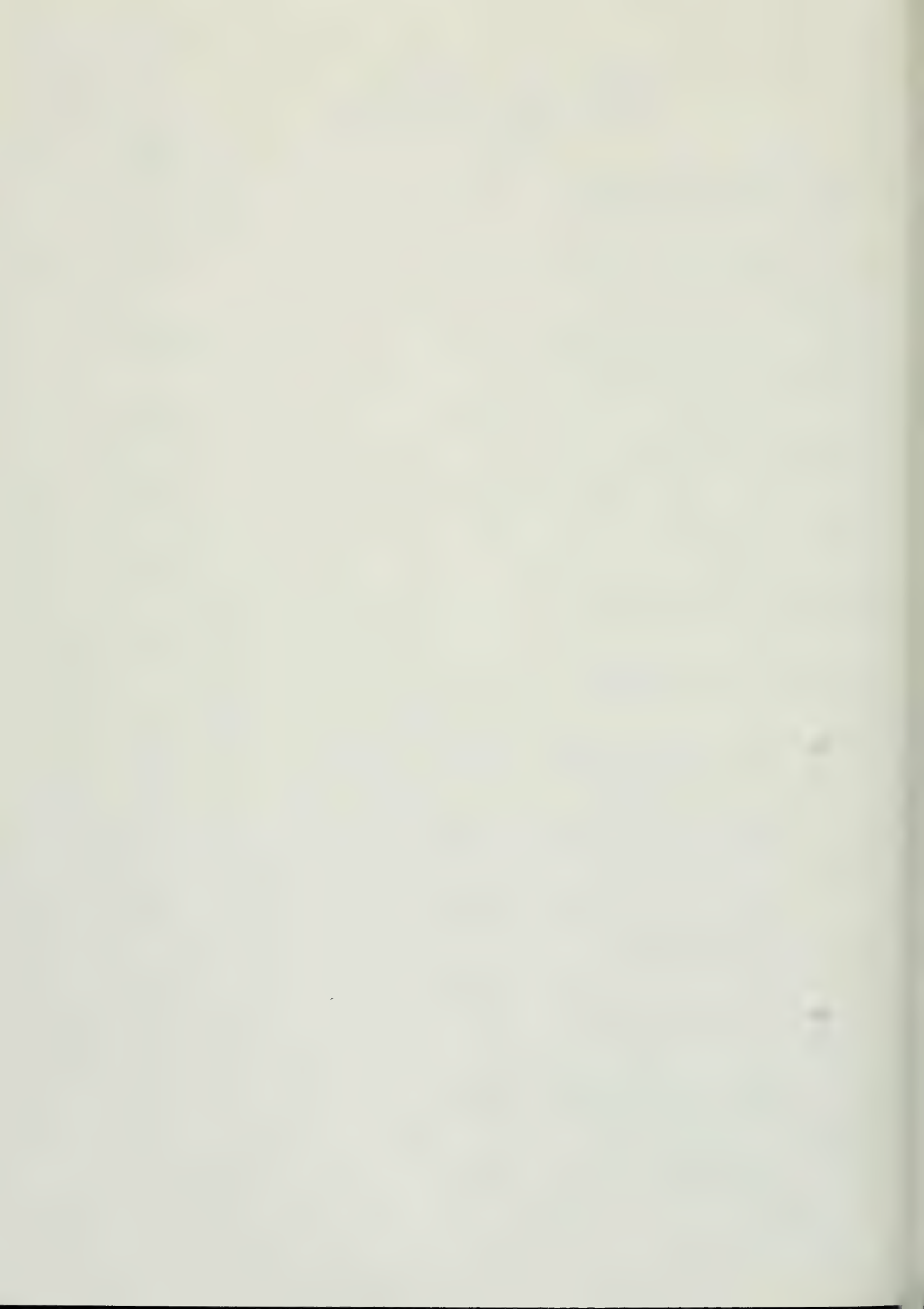
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N O. 2 0 9 2 6
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TERRY ALLAN WOLFE,

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Terry Allan Wolfe was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on December 8, 1965, in Case No. 35562-CD [C. T. 2].^{1/} The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to be Inducted.

On January 3, 1966, appellant was arraigned before the Honorable E. Avery Crary, United States District Court Judge and entered a plea of not guilty. Appellant was represented by

^{1/} "C. T. " refers to Clerk's Transcript of Record.



retained counsel at all stages of the proceedings. On January 24, 1966, Case No. 35562-CD was called for jury trial before the Honorable Peirson M. Hall, United States District Court Judge. The jury was impaneled and the trial was continued to January 25, 1966. On January 25, 1966, the trial in Case No. 35562-CD commenced before Judge Crary. Appellant was found guilty on that same date. On February 21, 1966, appellant was sentenced to the custody of the Attorney General for a term of 3 years and bond on appeal was set at \$100 [C. T. 6]. A timely notice of appeal was filed on February 21, 1966, and appellant was released on bond pending appeal [C. T. 7].

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, Section 462 and Title 18, United States Code, Section 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291, 1294.

II

STATUTES INVOLVED

Title 50 Appendix, Section 462, United States Code, provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or



neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both . . . "

Title 32 Code of Federal Regulations, 1641.2(b) provides in pertinent part:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege. "

Title 32 Code of Federal Regulations, 1625.2 provides in pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction (SSS Form No. 252) . . . unless the local board



first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. "

Title 32 Code of Federal Regulations, 1625.4 provides in pertinent part:

"When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification . . . "

Title 32 Code of Federal Regulations, 1642.2 provides in pertinent part:

"When it becomes the duty of a registrant . . . to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty. "



III

STATEMENT OF THE FACTS

At the time of the trial of this case a photographic copy of the official Selective Service System file for appellant was offered and admitted in evidence as Government's Exhibit No. 1 [R. T. 6]. ^{2/} This copy had attached to it a certificate by Captain T. D. Proffitt, U. S. A. F. (Ret.), District Coordinator, Selective Service System, that it was a full, true, and correct copy of the original file of which he had legal custody. Also attached was a certificate and seal of the Staff Secretary, Headquarters Southern area, Selective Service System, to the effect that Captain Proffitt was the District Coordinator and had custody of the original selective service file of the appellant.

This file and testimony of appellant during trial revealed the following events with respect to appellant's registration status in the Selective Service System:

Appellant registered with Local Board No. 134 on May 23, 1960, (SSS Form No. 1, pp. 1, 2). ^{3/} On July 2, 1962, Local Board No. 134, hereinafter referred to as "the Board", received from the defendant a completed Classification Questionnaire (Form SSS No. 100) wherein the defendant did not sign the section relating

2/ "R. T. " refers to Reporter's Transcript of Record.

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.



to "conscientious objector" (pp. 4, 7).

On May 14, 1963, the Board received from appellant the "Current Information Questionnaire" (SSS Form No. 127), wherein the appellant in no way noted that he claimed "conscientious objector" status (p. 14). On June 18, 1963 appellant was classified I-A, and on June 26, 1963, the notice of such classification (SSS Form No. 110) was mailed to him (pp. 3, 11).

On January 14, 1964, appellant was classified II-S, and a notice of such classification (SSS Form No. 110) was mailed to him, on January 24, 1964 (pp. 3, 11). On November 16, 1964, the Board reclassified appellant II-S, and on November 27, 1964, a notice of such classification (SSS Form No. 110) was mailed to him (pp. 3, 11). On January 6, 1965, the Board received a letter from appellant stating that he was graduating from San Diego State College on January 29, 1965, and that he intended to spend a semester in school at Mexico City studying spanish. Appellant requested the necessary forms for continuing his II-S classification (p. 23).

On February 11, 1965, appellant was classified I-A, and on March 2, 1965, the Board mailed to him a notice of such classification (SSS Form No. 110) (pp. 3, 11). Appellant made no written request for a personal appearance before the Board within ten days after the Board mailed the notice of classification of I-A (32 C. F. R. 1624.1(a)).

On March 15, 1965, the Board received from appellant a completed "Current Information Questionnaire" (SSS Form No. 127)

wherein appellant made no notation that he was a conscientious objector (p. 28). Attached to said questionnaire was a written statement by appellant wherein he stated that he was aware of his eligibility for the draft but would like postponement until completion of his education (p. 30).

On April 1, 1965, the Board mailed an order to appellant to report for a physical examination (SSS Form No. 223) (pp. 11, 32). Appellant did not file an appeal from his I-A classification within the period provided by the selective service regulations. 32 C. F. R. , 1626. 2(c)(1) and (3). On April 27, 1965, the Board mailed a second order to appellant to report for his physical examination, having been informed by appellant that he had not received word of the first order to report for physical examination until April 11, 1965 (pp. 11, 35, 36).

On May 5, 1965, the Board received from appellant a written request for an interview for the purpose of appealing his I-A classification. The basis for his request was not that he was a conscientious objector but that he wished to return to college to complete the courses necessary for him to obtain a teaching credential (p. 37). On May 5, 1965, the Board noticed that the appellant had requested an interview and appeal but was late in filing the appeal (p. 11).

On May 25, 1965, a statement of appellant's acceptability for induction into the armed services (D. D. Form 62) was mailed to appellant (pp. 11, 38). On June 30, 1965, the Board mailed appellant an order to report for induction (SSS Form No. 252) on

July 27, 1965 (pp. 11, 39). On July 6, 1965, the Board received a letter from appellant in which he states that he wishes to notify the Board that, "Because of my religious and moral convictions, I cannot have on my conscience the fact that I have trained myself for the killing of human life . . . I am, therefore, this 3rd day of July applying for classification as a conscientious objector" (pp. 11, 40).

On July 12, 1965, the Board sent appellant "Special Form for Conscientious Objector" (SSS Form No. 150), which the Board received in a completed form from appellant on July 14, 1965. On July 26, 1965, the appellant completed a second SSS Form No. 150 in the office of the Board (pp. 11, 42, 48). On July 26, 1965, the Board mailed appellant a "Postponement of Induction" (SSS Form No. 264), postponing his induction until further notice (pp. 11, 52). The Board postponed appellant's induction to consider his SSS Form No. 150 which he had submitted as the special form for a conscientious objector (p. 53).

On August 4, 1965, appellant was present at the Board's request at a meeting of the Board regarding his claim as a conscientious objector. Appellant advised the Board ". . . that he had planned to be married in May or June but that it did not work out so he filed a claim as a conscientious objector. He stated the reason he had never claimed it before was not because he was ashamed but because he was afraid that people would laugh at him and criticize him . . ." (p. 56). On August 4, 1965, the Board decided that the ". . . SSS Form No. 150 and the results of the

interview did not warrant reopening of the classification" (pp. 11, 56). On August 6, 1965, the Board mailed a letter to the appellant advising him that the facts presented by appellant did not warrant reopening or reclassification of his case at that time (Form C-140) (pp. 11, 57).

On August 9, 1965, the Board received a letter from appellant wherein he stated that he continued to consider himself a conscientious objector and ". . . if I am given an induction notice I will report, but I will declare myself a conscientious objector to the army" (p. 58).

On August 10, 1965, the California headquarters of the Selective Service System advised the Board by letter that it had reviewed appellant's selective service file, and that the postponement of his scheduled induction should be withdrawn and a new reporting date should be established allowing appellant ten days within which to report (p. 60).

On August 11, 1965, the Board received a letter from appellant stating that he was requesting an appeal from the Board's decision not to reclassify him (p. 61). On August 12, 1965, the Board mailed a letter to appellant notifying him that the postponement of his induction was terminated, that the Local Board had made no change in his classification status after carefully reviewing his SSS Form No. 150 and the August 4, 1965 interview. Appellant was further advised that his order to report for induction remained in effect, and he was directed to report for induction on August 24, 1965, at 6:30 A.M., to 2100 North Main Street,

Santa Ana, California (pp. 11, 64).

On August 24, 1965, appellant reported for induction and on the same date refused to be inducted. After appellant was informed of the criminal penalties involved for a refusal, he was again asked to submit to induction but he refused to be inducted. He gave as his reason that he did not, nor had he ever, believed in military service of any kind. He stated that he did not believe in violence, that he could not conscientiously be a part of the armed services, that he was prepared to go to trial for the defense of his position, and could not cooperate in armed training. He said he would "agree to perform an alternative service in accordance with his church" (pp. 11, 65-67).

IV

QUESTIONS RAISED ON APPEAL

I. Did the trial court err in admitting in evidence the Selective Service System File of the appellant?

II. Was there a basis in fact for the local board's rejection of the classification claims of appellant?

III. Was the local board required to reopen the classification of appellant and reclassify him after he presented his so-called "new evidence"?

IV. Was appellant denied due process at his induction ceremony?

ARGUMENT

- A. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE CERTIFIED PHOTOGRAPHIC COPY OF THE APPELLANT'S OFFICIAL SELECTIVE SERVICE FILE.
-

Rule 44(a), Federal Rules of Civil Procedure, provides that an official record or an entry therein, when admissible for any purpose, may be evidenced by a copy attested by the officer having legal custody of the record, and accompanied with a certificate that such office in which the record is kept is within the United States. The certificate may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office.

Title 28, United States Code, Section 1733, provides that records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept. Rule 1733 also provides that properly authenticated copies of any books, records, papers, or documents of any department or agency of the United States shall be admitted into evidence equally with the originals thereof.

Rule 27, Federal Rules of Criminal Procedure, provides that an official record or any entry therein may be proved in the

same manner as in civil actions

Appellant contends that the trial court erred by admitting into evidence a bound photographic copy of his original selective service file. This document had been attested and certified in compliance with the above mentioned rules of procedure (See Government's Exhibit No. 1).

It is not clear on what grounds appellant contends the document fell short of conformance with the applicable laws. He cites no case law to support his unique interpretation of Rule 44(a), Federal Rules of Civil Procedure, and Section 1733, United States Code, Title 28, nor does he specify what portion of these statutes make the certified copy of appellant's selective service file inadmissible.

This Circuit has previously approved the proposition that a duly authenticated copy of the registrant's selective service file is admissible in a prosecution for violation of Title 50 Appendix, United States Code, Section 462.

LaPorte v. United States, 300 F. 2d 878 (9th Cir. 1962);
Yaich v. United States, 283 F. 2d 613 (9th Cir. 1960);
Kariakin v. United States, 261 F. 2d 263 (9th Cir. 1958);
Olender v. United States, 210 F. 2d 795 (9th Cir. 1954).
See also: United States v. Borisuk, 206 F. 2d 338 (3rd Cir. 1953).

Appellant implies that the only way to properly introduce a registrant's selective service file into evidence is to bring into court each and every individual who has at one time worked on the

file, or had the file in his office (Opening Brief, pp. 7-8). Such a procedure would uselessly impede the swift trial of such cases, and clearly conflict with the purpose of Title 28, Section 1733, United States Code.

Wong Wing Foo v. McGrath, 196 F. 2d 120, 123 (9th Cir. 1952).

B. AT THE TIME APPELLANT WAS ORDERED
TO REPORT FOR INDUCTION HE WAS
PROPERLY CLASSIFIED I-A.

Title 32 Code of Federal Regulations, Section 1622.10, provides that every registrant who has failed to establish to the satisfaction of the local board, subject to appeal, that he is eligible for classification in another class, shall be placed in class I-A: "Available for military service".

It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant is considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board.

32 Code of Federal Regulations, Section 1622.1(c).

A court may not interfere with a registrant's classification unless it finds that there is no basis in fact for the classification or that the local board acted so arbitrarily and capriciously that the registrant was denied due process.

Witmer v. United States, 348 U.S. 375, 381 (1955);
Dickinson v. United States, 346 U.S. 389 (1953);
Estep v. United States, 327 U.S. 114, 122 (1946);
Cox v. United States, 332 U.S. 442, 448 (1947);
Rogers v. United States, 263 F.2d 283, 285 (9th
Cir. 1959).

A "basis in fact" means one having significance within the legal framework governing selective service classifications.

Badger v. United States, 322 F.2d 902, 907 (9th
Cir. 1963).

As was stated by the United States Supreme Court:

"The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classifications made by the local boards are justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant."

Estep v. United States, supra, at 122-123.

It is apparently not argued that the information contained

in appellant's classification questionnaire, and in his letters concerning his attempts to enroll in a college in Mexico, justified any classification other than I-A. Series VIII of the questionnaire (p. 7) does not reflect a claim to be a conscientious objector, while appellant's own letters show that he was not a full time student entitled to a II-S classification at the time he was given notice of induction. No other basis for deferment or exemption was shown.

C. EVIDENCE OF APPELLANT'S ATTEMPT
TO OBTAIN RECLASSIFICATION AFTER
HIS REFUSAL TO SUBMIT TO INDUC-
TION IS IRRELEVANT TO THE QUES-
TION OF WHETHER HIS REFUSAL
CONSTITUTED A VIOLATION OF LAW.

The trial court is not required to consider action of the local board relative to a claim of conscientious objection filed after appellant's refusal to submit to induction. Evidence of such action has no relevancy as a defense to the criminal conduct charged. Appellant seeks to create the illusion that the action of the board violated due process of law with respect to his classification and thereby rendered the order to report for induction illegal. However, the action of the board is unassailable when considered in view of the evidence it had before it at all times preceding appellant's refusal to submit to induction.

Without exception, in the cases cited by appellant to support his decision, the registrant made some effort to lay a factual basis

for his objection to induction before the time when he was ordered to report. In the case at hand appellant made no claim as a conscientious objector prior to receiving his notice to appear for induction.

The board cannot be criticized for acting reasonably upon information available to it. The case should be evaluated on the basis of (1) the local board's action up to the time of the induction, and (2) the appellant's behavior in defiance of the local board's action. See Cox v. United States, 332 U.S. 442, 454 (1947).

The probability of claims of exemption arising after the mailing of induction notice was anticipated by regulation. 32 Code of Federal Regulations, Section 1625.2 provides that the classification of a registrant shall not be reopened after the local board has mailed the registrant an order to report for induction, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which he has no control. This regulation has been upheld as applying to requests to reopen on claims of conscientious objection.

Wyman v. LaRose, 223 F.2d 849 (9th Cir. 1955);

Feuer v. United States, 208 F.2d 719 (9th Cir. 1955);

United States v. Biesiada, 247 Fed.Supp. 599

(S.D.N.Y. 1965).

In Keene v. United States, 266 F.2d 378, 383-84, (10th Cir. 1959), the Court stated:

"It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to

provide by regulation that no request for reopening or reclassification shall be entertained after notice to report for induction is mailed. Otherwise, the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest purpose of the proviso in Regulation 1625. 2. We think the regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied on to show a change in status must have occurred after the induction notice was mailed."

The evidence submitted at trial clearly shows that appellant's attempts to obtain a conscientious objector classification fell under the provisions of this regulation. Any evidence purporting to show conscientious objection which was submitted after refusal to submit to induction -- the principal unlawful act -- is irrelevant and not entitled to consideration as a defense to the charge.

D. ASSUMING ARGUENDO THAT SUBSEQUENT ACTION BY THE BOARD WAS RELEVANT TO THE ISSUE OF APPELLANT'S GUILT, AND THE TRIAL COURT SHOULD HAVE CONSIDERED THE LEGALITY OF THE LOCAL BOARD'S REFUSAL TO REOPEN APPELLANT'S CLASSIFICATION, THERE WAS NO VIOLATION OF DUE PROCESS OF LAW.

On June 30, 1965, appellant was mailed an order to report for induction into the armed forces (p. 39). On July 6, 1965, he wrote to his local board applying for classification as a conscientious objector (p. 40), and on July 14 filed a Selective Service Form for Conscientious Objector (p. 42). The local board held a hearing on August 4, 1965, which appellant attended. After hearing from appellant, and considering Special Form for Conscientious Objector, the board declined to reopen his classification (p. 56).

Appellant charges that his local board abused its discretion in declining to reopen his classification and thereby deprived him of appellate review of his classification. There is no quarrel with the principal that arbitrary and capricious action by a local board in refusing to reopen the classification constitutes a violation of due process of law and is action in excess of its jurisdiction. However, appellant's local board did not act in such a manner. The cases cited by appellant are readily distinguishable from his fact situation.

The two unreported District Court cases are of little help, for appellant gives no outline of pertinent facts, but only supplies the court's legal conclusions (Opening Brief, 16-17).

Appellant offers no authority for his contention that a registrant has the right to have his case reopened -- with accompanying appellate opportunity -- when no new circumstances beyond his control were presented to the board.

MacMurray v. United States, 330 F. 2d 928 (9th Cir. 1964), which appellant cites as authority for his contention that the local board should have reopened his case, deals with a defendant who appealed his I-O classification and was refused a hearing by the Justice Department. The Court dealt with the refusal, noting that on appeal the registrant had a right to such a hearing. It is true that after the Justice Department returned the registrant's file to his local board, that board refused to reopen the file, but such action was not an issue in the Court's decision. Clearly the MacMurray case deals with a set of facts not analogous to appellant's situation.

Appellant also cites Stain v. United States, 235 F. 2d 339 (9th Cir. 1956), as his other Ninth Circuit authority. In Stain the local board refused to reopen registrant's file after his armed forces physical, but before he was notified to report for induction. There was substantial evidence that registrant did not know of the I-O classification, that he was of unusually low mentality, and that the local board incorrectly thought that it was required to keep registrant's file closed after he had taken his physical examination. As in MacMurray, the decision in Stain is based on highly dissimilar facts from those in appellant's case.

The local board shall not reopen a registrant's classification

when, upon a registrant's written request to reopen and consider his classification, the facts presented would not in the opinion of the local board justify a change in classification. 32 Code of Federal Regulations, Section 1925. 4.

The classification of a registrant shall not be reopened after the board has mailed the registrant an order to report for induction unless the board first specifically finds there has been a change in registrant's status resulting from circumstances over which he has no control. 32 Code of Federal Regulations, Section 1625. 2.

There was no evidence of a change in appellant's status before the board at the time it reviewed the "new facts" presented by him. Appellant has the burden to establish his right to an exemption.

Fleming v. United States, 344 F. 2d 912 (10th Cir. 1965).

It is submitted that it is also incumbent upon the registrant to present evidence of a change in status resulting from circumstances over which he has no control if he seeks to have his classification reopened after mailing of the order to report for induction. Appellant's special form for conscientious objector fails under the most careful scrutiny to reveal anything suggesting a change in status. It does indicate the presence of an unarticulated attitude which has, according to appellant, existed for a number of years.

Absent any change of status resulting from circumstances

beyond appellant's control, the board cannot reopen his classification. Appellant's case is controlled by this Court's previous ruling in Boyd v. United States, 269 F.2d 607 (9th Cir. 1959), which involved a tardy claim of conscientious objection and refusal to reopen classification. See also United States v. Monroe, 150 F.Supp. 785 (S.D. Cal. 1957).

If it is found there was evidence supporting a specific finding of a change in appellant's status beyond his control, the question remains whether the board acted in excess of its jurisdiction in concluding that the facts presented by the appellant did not warrant reopening or reclassification.

The question of jurisdiction is reached only if there is no basis in fact for the board's opinion and for continuing appellant in Class I-A.

Estep v. United States, supra.

The task of the Court is to search the records for some affirmative evidence to support the local board's findings, and the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exempt status. His own admissions may be considered by the board as a basis for an inference as to appellant's sincerity and as to qualification of his professed conscientious objection in terms of statutory requirements.

Dickinson v. United States, supra, at 396-97.

Witmer v. United States, supra.

Therefore, if the review of the record before the board indicates any basis in fact for the board's conclusion that appellant's professed belief failed to meet the test of United States v. Seeger, 380 U. S. 163 (1964), that it was a sincere and meaningful belief which occupied in the appellant's life a place parallel to God of those admittedly qualifying for the exemption, judicial inquiry is at an end and the decision of the board must be considered as having been made in conformity with applicable regulations and final, even though it may have been erroneous.

Estep v. United States, supra, 122-23.

Serious question as to the appellant's sincerity is raised by the inconsistencies of his statements and position. The fact that he made no effort to establish his claim until after he was ordered to report for induction suggests that he resorted to the expedient of filing a conscientious objector claim to evade military service and criminal penalty. This possibility is indicated by appellant's statement to his local board that he had planned to be married in May or June, that it did not work out, and so he filed a conscientious objector claim (p. 56).

There is sufficient evidence in appellant's claim to form a basis for the inference that appellant's beliefs were actually rationalized, intellectual in their origin, and moral in their fundamental significance. Religious training and belief, in the context of conscientious objection entitling a registrant to exemption from military service, excludes essentially political, sociological, or philosophical views or a merely personal moral code.

Title 50, Appendix, United States Code, Section 462.

Taking all of these factors into consideration, it is apparent that the local board had a basis in fact for its opinion that the facts presented did not warrant reopening or reclassification. It is submitted, therefore, that the action of the board was not a violation of due process of law.

**E. APPELLANT FULLY UNDERSTOOD THE
PENALTIES HE FACED WHEN HE RE-
FUSED TO BE INDUCTED. THE PROPER
WARNINGS WERE GIVEN.**

There is ample evidence in the record (R. T. 42-50, 52) that appellant was given the required warnings of the statutory penalties for refusing to be inducted. Appellant, by his own testimony, understood the penalties for the violation when he refused to step forward (R. T. 46, 14).

Appellant makes a great deal of his contention that the warning was not given between the two opportunities to step forward for induction (Opening Brief, 19-21). It is difficult to understand -- and appellant certainly does not specify -- in what way such failure effected appellant's substantial rights.

In an earlier selective service appeal, involving a technical error in the local board's notice to report for induction, this Court said:

"Where there has been substantial compliance, so that a man has had all the considera-

tion due him, the courts have refused to reverse for mere technical irregularities. "

Mason v. United States, 218 F. 2d 375, 377 (9th Cir. 1954);

quoting United States v. Hagaman, 213 F. 2d 86 (3rd Cir. 1953).

It is suggested that the requirements of Chernekov v. United States, 219 F. 2d 721 (9th Cir. 1955), cited by appellant (Opening Brief, 20), were met by the inducting officers when the appellant refused to be inducted.

Chernekov itself distinguishes between minor technical errors and major failure to notify the potential inductee of the rights due him. In Chernekov ". . . the appellant was not given the prescribed opportunity to step forward nor the prescribed warning, " at p. 725. Such was not true in the dealings with appellant, who was in fact given as much, or more, opportunity to reconsider his decision in the face of serious penalties as was required in Chernekov.

The Court noted at page 725 in Chernekov that it was not overruling its earlier decision in Bradley v. United States, 218 F. 2d 657 (9th Cir. 1954). In Bradley the inductee was taken aside, warned of the consequences of his refusal to be inducted, signed a statement refusing to be inducted, but did not go through the "step forward" ceremony. Nevertheless the inductee's conviction was upheld, the Court holding that despite the technical violation of the inducting officer, the inductee understood the penalties, and

had adequate opportunity to change his mind. It is suggested that the warning in appellant's case was far more explicit, and more in keeping with technical requirements, than what was approved by this Court in the Bradley case.

A dated, signed statement by the registrant, stating that he refused to be inducted, has supported a conviction although no evidence that he was allowed to go through induction ceremony was presented.

Clark v. United States, 236 F. 2d 13, 20 (9th Cir. 1956); cert. denied 77 S. Ct. 101.

See also: United States v. Van Hook, 284 F. 2d 489, 494 (7th Cir. 1961).

Not only does appellant's authority fall short of criticizing a situation -- such as the appellant's -- where the potential inductee understands the penalties he is facing, but appellant fails to produce an incident of a court being so trifling as to demand that the warning of penalty come between the registrant's two opportunities to step forward.

The evidence leaves no doubt that appellant fully understood what he was doing when he refused to be inducted, due to the proper warnings given by the inducting officers.

VI

CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ

NO. 20927 ✓

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD RALPH WALKER, II,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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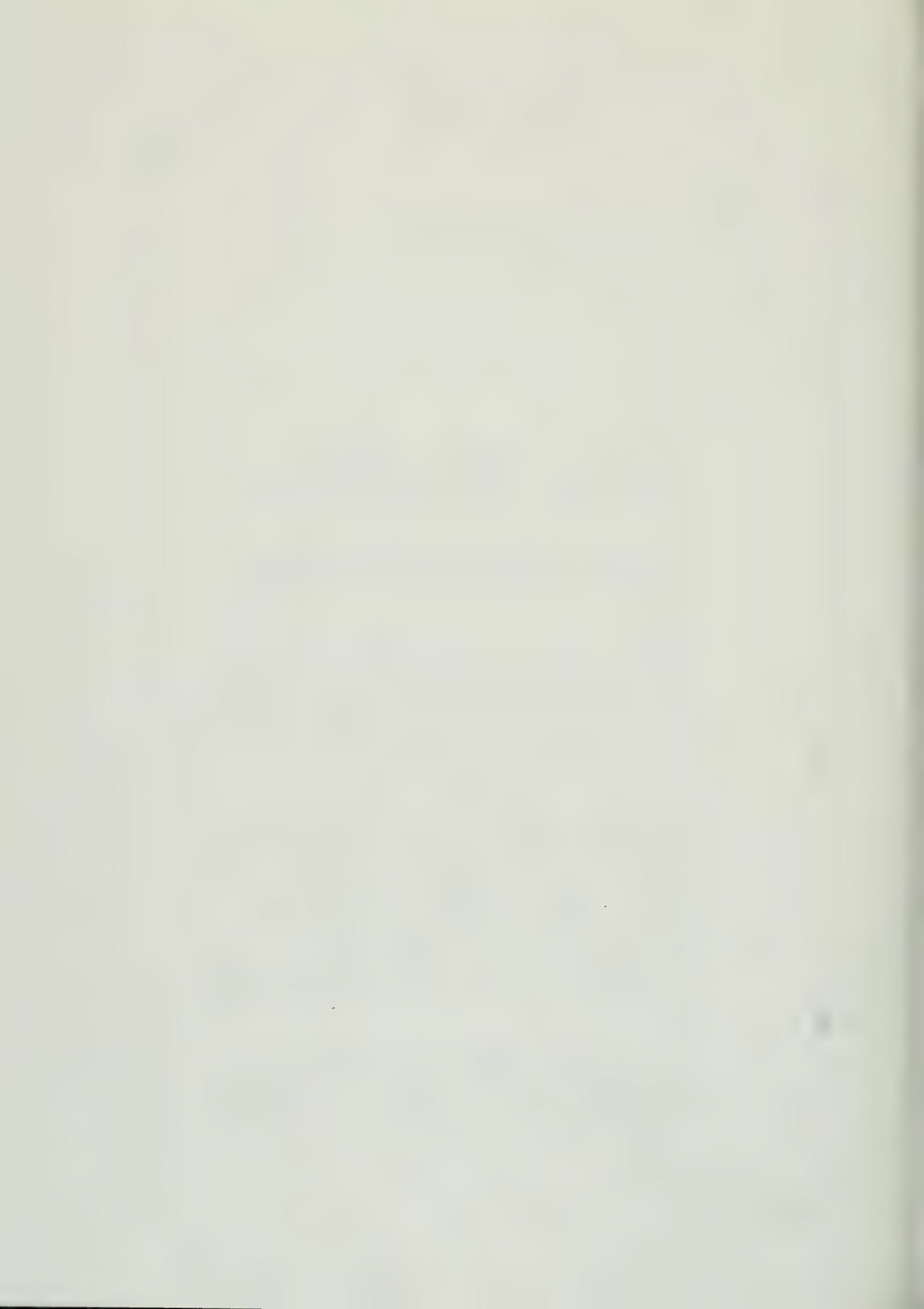
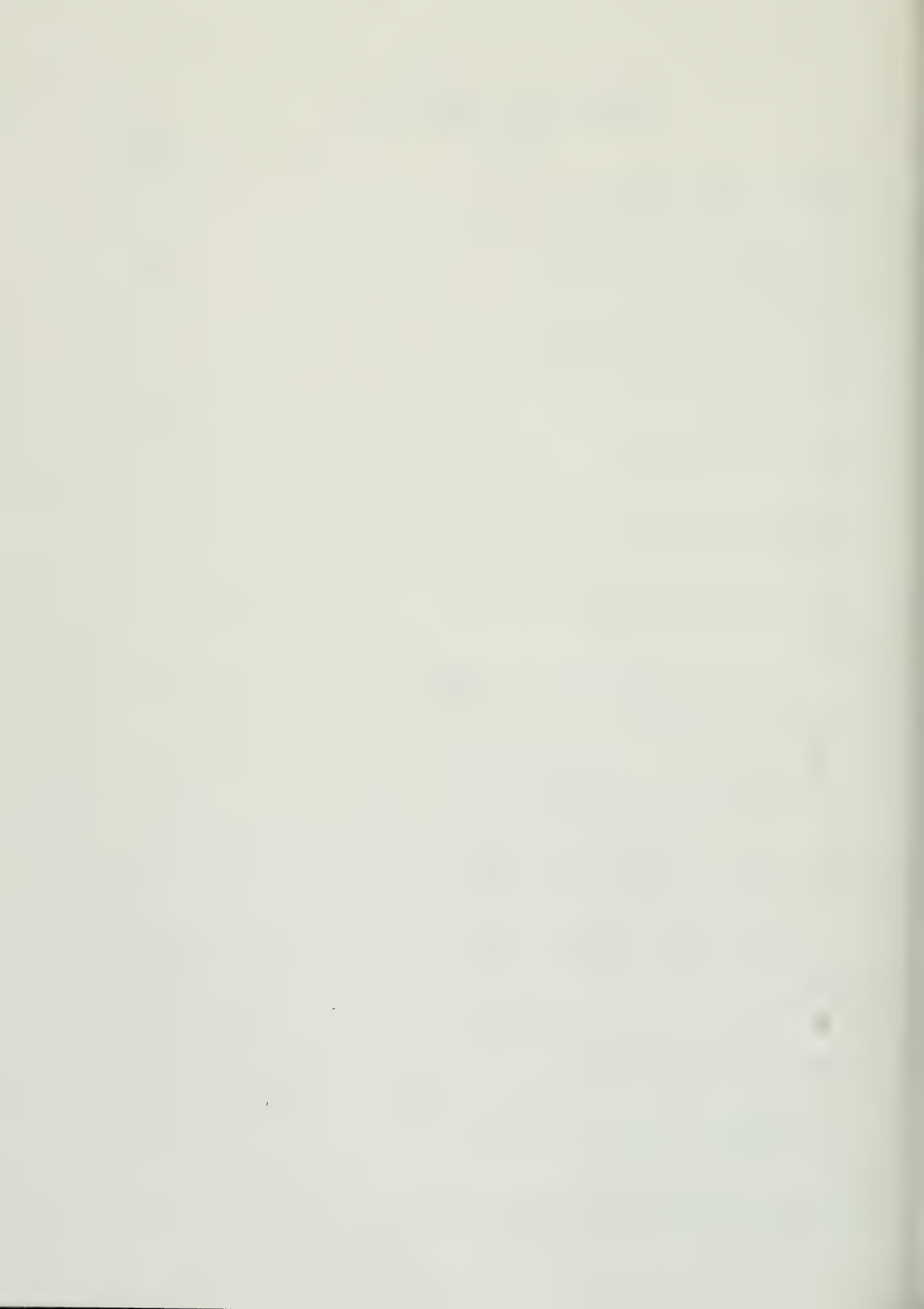


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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Leonard Ralph Walker, II, was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on December 15, 1965 in case No. 35581-CD [C. T. 2].^{1/} The indictment is in two counts and charges violations of Title 50 App., U. S. Code, Section 462, Universal Military Training and Service Act; Failure to Report for Induction, Failure to Report Address.

On January 3, 1966, appellant was arraigned before the

1/ "C. T. " refers to Clerk's Transcript of Record.



Honorable E. Avery Crary, United States District Court Judge, and entered a plea of not guilty to the two counts of the indictment. Appellant was represented by counsel at all stages of the proceedings. On January 24, 1966, case No. 3581-CD was called for jury trial before the Honorable Peirson M. Hall, United States District Court Judge. The jury was impaneled and the case was continued to January 25, 1966.

On January 25, 1966 the trial in case No. 35381 commenced before Judge Crary. On January 26, 1966 the jury returned a verdict of guilty as charged on both counts of the indictment. On February 21, 1966 appellant was sentenced to the custody of the Attorney General for a term of three years, the sentences to run concurrently on each of the two counts [C. T. 7]. A timely Notice of Appeal was filed on February 21, 1966 and appellant was released on \$500 bond pending appeal [C. T. 8].

Jurisdiction of the trial court was founded upon Title 50 App. U.S. Code Sec. 462 and Title 18, U.S. Code Section 3231. This court has jurisdiction pursuant to Title 28 U.S. Code Section 1291, 1294.

II

STATUTES INVOLVED

Title 50 App. , Section 462, United States Code, provides in pertinent part as follows:



"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both . . . "

Title 50 App. , Section 465(b) provides:

"It shall be the duty of every registrant to keep his local board informed as to his current address and change in status . . . "



III

STATEMENT OF THE FACTS

At the time of the trial of this case the original selective service file of appellant was offered and admitted in evidence as Government's Exhibit No. 1 [R. T. 12, 15].^{2/}

This file and testimony of appellant during trial revealed the following events with respect to appellant's registration status in the Selective Service System:

On April 12, 1962, the appellant registered at Local Board No. 116 (hereinafter referred to as the "Board"), Los Angeles, California. Appellant listed his address as 922 Larch Street, Inglewood, California (p. 1).^{3/} On November 27, 1963, appellant filed with a draft board in Spokane, Washington, the Current Information Questionnaire. This questionnaire was received by the Board on December 3, 1963 (p. 9).

On March 31, 1964, the Board mailed appellant a Classification Questionnaire. After being forwarded to at least seven different addresses, including appellant's addresses at Inglewood, California, Spokane, Washington, and Anchorage, Alaska, the questionnaire was returned to the Board unopened. On the underside of the envelope an obscene remark was written (pp. 9-18).

On June 8, 1964, the appellant was classified in Class 1-A

2/ "R. T. " refers to Reporter's Transcript of Record.

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit #1.



by the Board (p. 16). Thereafter, Form SSS 110, Notice of Classification, was mailed to appellant; however, this was returned to the Board unopened. On February 19, 1965, the Board in an effort to locate appellant, wrote a letter to Mr. Robert Morris, 4817 Alfred Avenue, San Diego requesting information as to the appellant's address. Mr. Morris replied and gave to the Board two different addresses where the appellant might be reached (pp. 24, 25). On March 26, 1965, the Board mailed appellant Form C-85, at a Sacramento, California, address, which address had been given to the Board by Mr. Morris. The letter was returned unopened after first being forwarded to appellant's previous address at Spokane, Washington (pp. 27, 28).

Thereafter, numerous other attempts were made by the Board to contact appellant and obtain his current address (pp. 31-35). On April 16, 1965, appellant was mailed an Order to Report for Armed Forces Physical Examination. This letter was sent to the appellant's previous Spokane, Washington address and then forwarded to appellant's father's address in San Diego, California. The letter was returned unopened (pp. 36-41). On June 21, 1965, the Board sent to appellant an Order to Report for Induction on July 20, 1965, at 9:30 A.M. The letter was returned to the Board unopened (pp. 47-56).

On September 30, 1965, appellant was interviewed by the FBI in San Diego, California. Appellant stated, inter alia, to the agents that he had no knowledge that he was wanted for induction



because all correspondence he received from the Draft Board was sent back by him to the Board unopened. Appellant further stated that if he had had knowledge that he had been called into the service he would not have reported as he would prefer to serve time in the federal penitentiary. Thereafter, on October 28, 1965, appellant was arrested by agents of the FBI in Lake Wohlford, California. At the time of his arrest defendant was using an alias.

IV

QUESTIONS RAISED ON APPEAL

I. Did the trial court err in admitting in evidence the Selective Service File of the appellant?

II. Was there a basis in fact for rejecting the appellant's classification claims?

III. Was the local board required to reopen the classification of appellant and reclassify him after he presented his so-called "new evidence"?

V

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED
IN EVIDENCE APPELLANT'S SELECTIVE
SERVICE FILE.

Title 28, United States Code, Section 1733, provides that



records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept.

Major Miller testified that the appellant's selective service file, which he delivered to the court, was in custody of the office which he headed (R. T. 14, 24), and in his custody as Coordinator of the Selective Service System, Southern District of California (R. T. 11, 15).

It is submitted that the introduction of the file into evidence is specifically sanctioned by Section 1733 noted above. Appellant cites Title 28, United States Code, Section 1732 in support of his contention of admissibility, but fails to indicate how Section 1732 applies to this case, or to cite any authority supporting his unique interpretation of this section. It is further suggested that Section 1732 does not apply to the admission of the appellant's Selective Service file.

Contrary to appellant's supposition (Opening Brief, 6-7), the Government did not introduce the original file in the Walker case in order to remedy any supposed inadequacies in earlier trials. The Government is allowed the alternative of introducing in evidence the original file or the certified copy thereof.

This court has previously approved the proposition that a duly authenticated copy of the registrant's selective service file is admissible in a prosecution for violation of Title 50, Appendix, United States Code, Section 462.



Yaich v. United States, 283 F. 2d 613 (9th Cir. 1960);

Kariakin v. United States, 261 F. 2d 263 (9th Cir.
1958);

LaPorte v. United States, 300 F. 2d 878 (9th Cir.
1962);

Olender v. United States, 210 F. 2d 795 (9th Cir.
1954).

See also: United States v. Borisuk, 206 F. 2d 338
(3rd Cir. 1953).

It follows that better evidence -- the original copy, duly authenticated -- would likewise be admissible.

Appellant implies that the only way to properly introduce a registrant's selective service file into evidence is to bring into court each and every individual who has at one time worked on that file, or had the file in his office (Opening Brief, 7-8). Such a procedure would uselessly impede the swift trial of such cases and would conflict with the purpose of Title 28, United States Code, Section 1733.

Wong Wing Foo v. McGrath, 196 F. 2d 120, 123
(9th Cir. 1952).

B. AT THE TIME APPELLANT WAS ORDERED
TO REPORT FOR INDUCTION HE WAS
PROPERLY CLASSIFIED 1-A.

32 Code of Federal Regulations, Section 1622.10, provides that every registrant who has failed to establish to the satisfaction



of the local board, subject to appeal, that he is eligible for classification in another class, shall be placed in Class 1-A; "Available for military service. "

It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant is considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. 32 Code of Federal Regulations, §1622.1 (c).

It is apparently not argued that appellant's failure to even fill out the classification questionnaire (p. 4) justified any classification other than 1-A. Series VIII of the questionnaire does not reflect a claim to be a conscientious objector, nor does appellant claim any other exemption prior to the time of his induction date (p. 7).

**C. EVIDENCE OF APPELLANT'S ATTEMPT
TO OBTAIN RECLASSIFICATION AFTER
HIS FAILURE TO REPORT FOR INDUC-
TION IS IRRELEVANT TO THE QUESTION
OF WHETHER HIS REFUSAL CONSTI-
TUTED A VIOLATION OF LAW.**

The trial court was not required to consider the action of the local board relative to a claim of conscientious objection filed after appellant's failure to report for induction. Evidence of such action had no relevancy as a defense to the criminal conduct charged. Appellant seeks to create the illusion that the

action of the Board violated due process of law with respect to his classification and thereby rendered the order to report for induction illegal. However, the action of the Board was unassailable when considered in view of the evidence it had before it at all times preceding appellant's failure to report for induction.

Without exception, in the cases cited by appellant to support his position, the registrant has made some effort to lay a factual basis for his objection to induction before the time when he was ordered to report. Appellant made no claim as a conscientious objector prior to receiving his notice to appear for induction.

The Board cannot be criticized for acting reasonably upon information available to it. The case should be evaluated on the basis of (1) the local board's action up to the time of induction, and (2) the appellant's behavior in defiance of the local board's action. See Cox v. United States, 332 U. S. 442, 454 (1947).

The probability of claims of exemption arising after the mailing of induction notices was anticipated by regulation. 32 Code of Federal Regulations, Section 1625.2 provides that the classification of a registrant shall not be reopened after the local board has mailed the registrant an order to report for induction, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which he has no control. This regulation has been upheld as applying to requests to reopen a claim of conscientious objection.

Wyman v. La Rose, 223 F.2d 849 (9th Cir. 1955);

Feuer v. United States, 208 F.2d 719 (9th Cir. 1955);
United States v. Biesiada, 247 F.Supp. 599
(S. D. N. Y. 1965).

In Keene v. United States, 266 F.2d 378, 383-84 (10th Cir. 1959), the court stated:

"It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening or reclassification shall be entertained after notice to report for induction is mailed. Otherwise the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest purpose of the proviso in Regulation 1625. 2. We think the regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied on to show a change in status must have occurred after the induction notice was mailed. "

The evidence submitted at trial clearly shows that appellant's attempt to obtain a conscientious objector classification fell under the provisions of this regulation. Any evidence

purporting to show conscientious objection which was submitted after failure to report for induction -- the principal unlawful act -- is irrelevant and is not entitled to consideration as a defense to the charge.

D. ASSUMING ARGUENDO THAT SUBSEQUENT ACTION BY THE BOARD WAS RELEVANT TO THE ISSUE OF APPELLANT'S GUILT, AND THE TRIAL COURT SHOULD HAVE CONSIDERED THE LEGALITY OF THE LOCAL BOARD'S REFUSAL TO REOPEN APPELLANT'S CLASSIFICATION, THERE WAS NO VIOLATION OF DUE PROCESS OF LAW.

On June 18, 1965 appellant was mailed a delinquency notice for failure to report for his armed forces physical (p. 38). On June 21, 1965 appellant was mailed an order to report for induction (p. 44). On October 1, 1965 appellant wrote his local board, noting that he had been contacted by the F. B. I. and claiming that he had never received an induction notice (p. 57). On October 5, and again on October 25, appellant wrote the local board asking for selective service form for conscientious objector (pp. 59, 62).

Appellant contends that the local board abused its discretion in declining to reopen his classification and thereby depriving him of appellate review of his classification. There is no quarrel with the principle that arbitrary and capricious action by a local board in refusing to reopen a classification constitutes a violation of due process of law and is action in excess of its jurisdiction.

However, appellant's local board did not act in such a manner. The cases cited by appellant are readily distinguishable from his fact situation. The two unreported District Court cases are of little help, for appellant gives no outline of pertinent facts, but only supplies the court's legal conclusions (Opening Brief, 16-17).

Appellant offers no authority for his contention that a registrant has the right to have his case reopened -- with accompanying appellate opportunities -- when no new circumstances beyond his control are presented to the board.

MacMurray v. United States, 330 F.2d 928 (9th Cir. 1965), which appellant cites as authority for his contention that the local board should have reopened his case, deals with a defendant who appealed his 1-O classification and was refused a hearing by the Justice Department. The court dealt with the refusal noting that on appeal the registrant had a right to such a hearing. It is true that in MacMurray, after the Justice Department returned the registrant's file to his local board, that Board refused to reopen the file, but such action was not an issue in the court's decision. Clearly the MacMurray case deals with a set of facts not analogous to appellant's situation.

Appellant also cites Stain v. United States, 235 F.2d 339 (9th Cir. 1956), as his other Ninth Circuit authority. In Stain the local board refused to reopen registrant's file after his armed forces physical, but before he was notified to report for induction. There was substantial evidence that the registrant did not know of the 1-O classification, that he was of unusually low mentality, and

that the local board incorrectly thought it was required to keep registrant's file closed after he had taken his physical examination. As in MacMurray, the decision in Stain is based on particularly dissimilar facts from those in appellant's case.

The local board shall not reopen a registrant's classification when, upon a registrant's written request to reopen and consider his classification, the facts presented would not in the opinion of the board justify a change in classification. 32 Code of Federal Regulations, Section 1925. 4.

The classification of a registrant shall not be reopened after the Board has mailed the registrant an order to report for induction unless the Board first specifically finds there has been a change in registrant's status resulting from circumstances over which he has no control. 32 Code of Federal Regulations, Section 1625. 2.

There was no evidence of a change in appellant's status before the Board at the time it reviewed the "new facts" presented by him. Appellant has the burden to establish his right to an exemption. Fleming v. United States, 344 F.2d 912 (10th Cir. 1965). It is submitted that it is also incumbent upon the registrant to present evidence of a change in status resulting from circumstances over which he has no control if he seeks to have his classification reopened after mailing of the order to report for induction.

Appellant's Special Form for Conscientious Objector fails under the most careful scrutiny to reveal anything suggesting a

change in status. It does indicate the presence of an unarticulated attitude which has, according to appellant, existed for a number of years. Absent any change of status resulting from circumstances beyond appellant's control, the Board cannot reopen his classification. It is submitted that appellant's case is controlled by this court's previous ruling in Boyd v. United States, 269 F. 2d 607 (9th Cir. 1959), which involves a tardy claim of conscientious objection and refusal to reopen classification. See also United States v. Monroe, 150 F. Supp. 785 (S. D. Cal. 1957).

If it is found there was evidence supporting a specific finding of change of appellant's status beyond his control, the question remains whether the Board acted in excess of its jurisdiction in concluding that the facts presented by the appellant did not warrant reopening or reclassification.

The question of jurisdiction is reached only if there is no basis in fact for the Board's opinion and for continuing appellant in Class 1-A.

Estep v. United States, 327 U.S. 114 (1946).

The task of the courts is to search the record for some affirmative evidence to support the local board's finding, and the courts may properly insist there be some proof that is incompatible with the registrant's proof of exempt status. His own admissions may be considered by the Board as a basis for an inference as to appellant's sincerity and as to qualification of his professed conscientious objection in terms of statutory requirements.

Dickinson v. United States, 346 U.S. 389, 398-97
(1953);

Witmer v. United States, 348 U.S. 375 (1955).

Therefore, if the review of the record before the Board indicates any basis in fact for the Board's conclusion that appellant's professed belief failed to meet the test of United States v. Seeger, 380 U.S. 163 (1964), i. e., that it was a sincere and meaningful belief which occupied in the appellant's life a place parallel to God of those admittedly qualifying for the exemption, judicial inquiry is at an end and the decision of the Board must be considered as having been made in conformity with applicable regulations and such decision is final, even though it may have been erroneous.

Estep v. United States, supra, 122-23.

A serious question as to appellant's sincerity is raised by his conduct in failing to report his change of address to his local board, scrawling an obscenity on the envelope containing his selective service form (p. 13), and in returning all selective service mail unopened (p. 57; R. T. 27. 14, 57-61).

The fact that he made no effort to establish his claim until after failing to report for induction suggests that he resorted to the expedient of filing a conscientious objector claim to evade military service and criminal penalty.

There is sufficient evidence in appellant's claim to form a basis for the inference that appellant's beliefs were actually

rationalized, intellectual in their origin, and moral in their fundamental significance. Religious training and belief, in the context of conscientious objection entitling a registrant to exemption from military service, excludes essentially political, sociological, or philosophical views or a merely personal moral code. Title 50, Appendix, U. S. Code, Section 462.

Taking all these factors into consideration, it is apparent that the local Board had a basis in fact for its opinion; that the facts presented did not warrant reopening or reclassification. It is submitted, therefore, that the action of the board was not a violation of due process of law.

E. NOTWITHSTANDING THE COURT'S DECISION ON COUNT ONE, APPELLANT WAS PROPERLY CONVICTED ON COUNT TWO OF THE INDICTMENT.

It should be noted that appellant's opening brief fails to mention the conviction and three-year sentence on Count Two of the indictment for failure to keep the local board advised of his address.

Appellant's failure to challenge the conviction on Count Two implicitly acknowledges the validity of this conviction and renders this appeal ineffective since appellant was convicted and sentenced to concurrent three-year sentences.

Therefore this appeal is frivolous since the sentence imposed in Count One is concurrent with the sentence imposed in

Count Two and appellant fails to challenge the validity of the conviction on Count Two of the indictment.

Mishan v. United States, 345 F. 2d 790 (5th Cir. 1965).

VI

CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ

NO. 20928

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APPEAL FROM
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SOUTHERN DIVISION

FILED

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, following a jury trial [C. T. 2-4, 52]. 1/

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

1/ "C. T. " refers to the Clerk's Transcript of Record.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that beginning at a date unknown to the Grand Jury and continuing to on or about April 13, 1963, appellant, unindicted co-conspirator Martin Stuart Gold, and divers other persons agreed, confederated, and conspired together to commit offenses against the United States, namely, knowingly and with intent to defraud the United States, to import and bring marihuana into the United States from Mexico, and to smuggle and clandestinely introduce marihuana into the United States from Mexico, without presenting said marihuana for inspection and without entering and declaring said marihuana, and to conceal, transport, and facilitate the concealment and transportation of marihuana which had been imported into the United States contrary to law, such conspiracy being in violation of Title 21, United States Code, Section 176a. Two overt acts were alleged [C. T. 2-3].

Count Two charged that Martin Stuart Gold, with intent to defraud the United States, knowingly smuggled and clandestinely introduced approximately 44 pounds of marihuana into the United States from Mexico, and that appellant knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C. T. 4].

Appellant filed a Notice of Motion For Statement of

Evidence Favorable to Defendant If Material To The Issue of Guilt, dated May 14, 1964 [C. T. 11]. Appellee filed an extensive response to this request [C. T. 14-16].

Jury trial of appellant commenced on May 19, 1964, before United States District Judge Fred Kunzel, and appellant was found guilty as charged on May 21, 1964 [C. T. 17, 26].

Appellant subsequently jumped bail, his bond was forfeited, and a bench warrant was issued [C. T. 51].

On October 22, 1965, appellant's motion for a new trial was denied, and he was sentenced to the custody of the Attorney General for a period of five years on each count, to run concurrently [R. T. 3, 5]. ^{2/}

Later that day, after being advised that appellant's conviction in a state case had been reversed upon appeal upon the grounds of illegal search and seizure and unlawful arrest, ^{3/} and after hearing additional argument, the Court granted the motion for new trial and vacated the sentence [R. T. 11-12].

Appellant's second jury trial commenced on November 18, 1965, before Judge Kunzel [R. T. 17]. Appellant was found guilty as charged on November 24, 1965 [C. T. 52]. The jury deliberated for 50 minutes [R. T. 326, 328]. At the first trial the jury deliberated for 47 minutes [C. T. 26].

^{2/} "R. T. " refers to the Reporter's Transcript. Since there is some repetition in the numbering of the pages, any reference to the first trial will be specially noted in this brief.

^{3/} People v. Theobald, 231 Cal. App. 2d 351 (1964).

Thereafter, on December 17, 1965, appellant was sentenced to the custody of the Attorney General for a period of five years on each count, to run concurrently, with a recommendation that the Georgia State Prison be designated as the place of confinement under the sentence [C. T. 80].

Appellant thereafter filed a timely notice of appeal [C. T. 81].

III

ERROR SPECIFIED

Appellant's opening brief lists the following points upon appeal (at pp. 4-5):

"(1) Appellant urges that the trial court erred in admitting the testimony of Government witness, RONNA ADRIAN, offered in an attempt to prove that appellant had agreed to sell, but had not in fact sold marihuana at a time prior to April 3, 1963. (R. T. 147-159).

"(2) Appellant urges that the trial court erred in not giving to the jury a cautionary instruction limiting the effect of the testimony of the witness, RONNA ADRIAN. (R. T. 299-324, at 319).

"(3) Appellant urges that the trial court erred in admitting, over appellant's objection, evidence secured as the result of an illegal search and seizure

occurring on April 19, 1963. (R. T. 165, 176-182, 196-198).

"(4) Appellant urges that the trial court erred in denying appellant's motion to suppress as evidence a physical object, to wit: an address book, seized by officers as a result of an illegal search and seizure at appellant's residence on April 19, 1963. (R. T. 165, 176-182, 196-198). "

IV

STATEMENT OF THE FACTS

Appellant had a conversation with Martin Gold a few weeks prior to April 13, 1963, and subsequently met Gold in Mexico, where they transferred marihuana into a vehicle operated by Gold. Gold transported the marihuana to Los Angeles and took it to appellant's house [R. T. 100-101].

Later, on April 13, 1963, appellant and Gold met in a coffee shop in Hollywood and appellant asked Gold to go to Tijuana, Mexico, as appellant planned to buy some marihuana. Gold agreed to drive to Tijuana alone and wait for appellant there [R. T. 97-99].

On the same day appellant borrowed a 1958 Ford automobile from Michele Restuccia, having stated that he wanted to use the vehicle to go to Lancaster to move some furniture and look at some property [R. T. 138-139].

Appellant told Gold to use Restuccia's vehicle and gave him

the key. Gold obtained the car at a restaurant in Hollywood [R. T. 104, 130-132]. Appellant and Gold met in Tijuana and drove their two vehicles to a side road, where they transferred marihuana from appellant's vehicle to the one operated by Gold. Gold then drove alone across the international border into San Diego County, California, and was arrested on the same date, April 13, 1963 [R. T. 65-66, 99-100].

When he entered the United States, Gold stated that he had nothing from Mexico. He was asked to open the trunk of the vehicle and stated that his friend had the trunk key. A Customs inspector found 44 pounds of marihuana under the seats of the vehicle [R. T. 66, 68, 70, 71, 137]. The marihuana had a value of approximately \$1100 in Tijuana, Mexico [R. T. 175].

About three days later appellant told Restuccia that the Ford had ended up in the hands of the Government, that Restuccia had lost the car, that appellant felt responsible, and that appellant would reimburse Restuccia \$500 or \$600 for the loss [R. T. 139-140].

On April 19, 1963, Los Angeles City Police Sergeant D. W. Beckmann, two Customs agents, and two other city officers went to appellant's residence on Weepah Way in Hollywood [R. T. 163, 183, 185, 193]. Sergeant Beckmann had been informed by Sergeant Raymond Camacho of the same detail that Martin Gold was selling marihuana for appellant [R. T. 184, 187]. He also had been informed by Deputy Sheriff Joe Lesnick that appellant was dealing in marihuana from his Weepah Way residence [R. T. 184, 185, 196].

Furthermore, he knew that appellant had been arrested in March with six pounds of marihuana and six or seven pounds of peyote, and he knew the details of Gold's arrest at San Ysidro and information given to Customs Agent Neil Greppin by persons arrested by him [R. T. 184, 187]. ^{4/}

The officers had no warrant of arrest and no search warrant. The purpose of the visit was to talk to appellant. The five officers surrounded the house [R. T. 187-188, 193].

Appellant answered the officers' knock upon the door. Several people were sitting in the living room. After the officers identified themselves, an individual named Taylor grabbed a white object from the table next to him and ran into the bedroom [R. T. 185, 190]. Sergeant Beckmann, believing that Taylor was going to dispose of contraband, having taken into consideration his own past experiences and observations as a narcotics investigator for approximately 10 years, forced his way through the door and recovered marihuana in the bedroom into which Taylor had run. Additional marihuana was found in the ivy outside of the premises. The marihuana in the bedroom was not in Taylor's possession [R. T. 185, 190, 195].

Sergeant Beckmann arrested appellant. After the arrest he picked up Government Exhibit 7 for Identification (a telephone book) and other papers [R. T. 167-168, 191-192]. Government Exhibit 7 for Identification was not received in evidence at the

^{4/} The testimony summarized in this paragraph was heard outside of the presence of the jury.



trial [R. T. 342]. Appellant testified that the exhibit looked like his wife's telephone book [R. T. 239].

Appellant stated to the officers that he did not know Michele Restuccia, did not know Martin Gold, and had gone shopping with his wife on April 13, 1963. He also stated that he had borrowed a vehicle on April 14 but would not name the person from whom he borrowed it [R. T. 75-76, 165-166].

Appellant testified at the trial and claimed innocence. He admitted knowing Restuccia and Gold [R. T. 227-228]. He admitted that he had told Gold on April 13 that he could use Restuccia's Ford. He denied having later offered to pay Restuccia for the loss of the Ford, and he denied having told officers that he went shopping with his wife on April 13. He admitted two felony convictions [R. T. 227-228, 235-236, 240].

Ronna Adrian testified that in April, 1963, she discussed with appellant the purchase of some marihuana from him, and she believed that the delivery was to take place later and believed that the purchase was not completed because of the arrests that happened [R. T. 151-152, 157-158]. She admitted a felony conviction and stated that she was on parole and believed that her testimony would have no effect upon her parole. Adrian was on state, not federal parole [R. T. 152, 154-155, 158].

Gold, who had testified concerning appellant's conversations and subsequent activities in Mexico, admitted that he had told the officers on the date of his arrest that he knew nothing about the marihuana and told them that he had borrowed the vehicle from

Restuccia [R. T. 106, 112]. There was evidence that Gold testified at his own trial, in his own defense, in contradiction to his testimony in the instant case. Gold's testimony also was contradicted by that of Michael De Carlo, who was in a mental institution at the time of trial [R. T. 113-114, 116, 118-119, 198, 201].

Gold was convicted at his own trial and sentenced to seven years in prison. This was later reduced to five years [R. T. 119, 123].

Mrs. Dickie Huggins was another missing witness for appellant. Since she could not be located, her testimony from appellant's prior trial was read into the record. She testified that she had been shopping with appellant for 4 or 4-1/2 hours on the afternoon of April 13, 1963, and that appellant had stated that he didn't have a car [R. T. 224-226].

V

ARGUMENT

A. THE TESTIMONY OF WITNESS RONNA ADRIAN WAS PROPERLY ADMITTED.

Appellant asserts that the trial Court committed error in admitting the testimony of witness Ronna Adrian. He contends that the evidence was highly prejudicial and irrelevant.

Appellant was charged with a conspiracy to smuggle, conceal, transport, and facilitate the concealment and transportation of marihuana. It was alleged that the conspiracy commenced at an



unknown date and continued to on or about April 13, 1963. It was alleged that appellant conspired with Martin Stuart Gold "and divers other persons to the Grand Jury unknown" [C. T. 2-3].

Ronna Adrian testified that "around that time" in April, 1963, she discussed with appellant the purchase of some marihuana from him, and she believed that the delivery was to take place later and believed that the purchase was not completed because of the arrests that happened [R. T. 151-152, 157-158]. Appellant was arrested on April 19, 1963 [R. T. 74, 77-78]. ^{5/}

The jury could justifiably conclude that the offer to sell marihuana to Ronna Adrian was "on or about April 13, 1963", ^{6/} that it was part of the alleged conspiracy to "conceal, transport and facilitate the concealment and transportation of marihuana", and that Ronna Adrian was one of the conspirators listed as "divers other persons to the Grand Jury unknown". Since the 44 pounds of marihuana obviously were imported for purposes of sale, purchasers were necessary in order to avoid a failure of the conspiracy.

Consequently, the evidence concerning an offer to sell marihuana was proper evidence of appellant's commission of the

^{5/} The fact that appellant also was arrested on March 5, 1963 [FIRST TRIAL R. T. 383] apparently was not before the jury in this trial.

^{6/} Appellant's counsel stated that he believed that all events mentioned in the testimony at trial occurred prior to April 19, 1963 [R. T. 265]. He concedes in his brief that the Adrian testimony refers to events occurring prior to April 13, 1963 [Appellant's Opening Brief, p. 4].

crime charged (i. e., conspiracy) rather than commission of "other offenses" as suggested by appellant and the rule of law upon which he relies.

"It should be borne in mind that in a conspiracy case wide latitude is allowed in presenting evidence and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged."

Schino v. United States, 209 F.2d 67, 74
(9th Cir. 1953).

Assuming, arguendo, that the offer to sell constituted an independent crime, the evidence was properly admitted.

Evidence of other crimes may be admissible to show knowledge, intention, absence of mistake or accident, and to prove the crime charged.

Teasley v. United States, 292 F.2d 460, 467
(9th Cir. 1961);

Anthony v. United States, 256 F.2d 50, 53
(9th Cir. 1958).

In Teasley, supra, the appellant was charged with sale, concealment, transportation, and facilitation of concealment, transportation, and sale of heroin. This Court approved the ruling of the trial court permitting introduction of a partially-smoked marihuana cigarette and a white powder found in appellant's apartment, which was away from the scenes of the alleged crimes (at pp.



463, 466-467).

In Anthony, supra, where the appellant was charged with sale and facilitation of sale of marihuana, evidence was introduced showing that two bags of marihuana were found in the appellant's vehicle a few minutes after he participated in the sale of marihuana. The evidentiary ruling was approved upon appeal.

In Wright v. United States, 192 F.2d 595 (9th Cir. 1951), where the appellant was charged with possession of marihuana, this Court approved (at p. 597) the ruling of the trial court permitting introduction of evidence of the appellant's possession of marihuana and dealing in marihuana at a time previous to the date of the alleged crime.

In Ng Sing v. United States, 8 F.2d 919, 920 (9th Cir. 1925), this Court held that the fact of sale of opium might have a tendency to establish a charge of possession of opium.

It has been held that evidence that a defendant smoked marihuana in the past is admissible where the charges are smuggling and concealing marihuana.

Klepper v. United States, 331 F.2d 694, 698-99
(9th Cir. 1964).

It also has been held that where the charges involve alleged opium crimes, evidence of an appellant's possession of opium and yen shee near the scene of the alleged crime was admissible to show guilty knowledge.

Stein v. United States, 166 F.2d 851, 855
(9th Cir. 1948).

Evidence that a defendant smoked opium is relevant and admissible upon a charge of manufacturing opium.

Tam Shi Yan v. United States, 224 Fed. 422
(2nd Cir. 1915).

In Nolan v. United States, 31 F.2d 426, 427 (9th Cir. 1929), where the defendant was charged with unlawful possession and manufacture of liquor, unlawful possession of property designed for the manufacture of liquor, and maintenance of a nuisance, it was held that evidence was properly received that on about 10 different occasions the defendant delivered liquor in jugs to a taxi driver. This Court stated:

"This testimony, no doubt, tended to show the commission of other crimes; but, if it also tended to show the commission of the crimes charged in the information, the appellant cannot complain, and the testimony clearly had some tendency in that direction." (at p. 427).

In Cohen v. United States, 124 F.2d 164 (2nd Cir. 1941), the defendants were charged with concealing, transporting, and facilitating the concealment and transportation of morphine. They argued that the court committed error by permitting evidence of manufacture and sale of narcotics. The Court of Appeals rejected the argument:

"The argument that the admission of proof of manufacture and sale of narcotics was improper, when

the charge only related to possession, has no reasonable basis. The evidence of manufacture and sale necessarily tended to prove possession for the very purpose of a later sale." (at p. 166, emphasis added).

In the instant case, the evidence of offer to sell had the same tendency to prove the motive for possession.

In Teasley, supra, 292 F.2d 460, where the defendant was charged with heroin offenses, evidence of his possession of a partially-smoked marihuana cigarette was received over objection. This Court affirmed the conviction, although the relationship of marihuana and heroin is sufficiently remote to conclude that the merits were far more favorable to the appellant in Teasley than in the instant case, with its close relationship between a conspiracy to transport, etc., marihuana and an offer to sell marihuana, which would necessarily involve an offer to transport the same.

Teasley, supra, is mentioned without criticism in Enriquez v. United States, 314 F.2d 703, 717 (9th Cir. 1963), so it is evident that Enriquez was not intended to overrule Teasley. In Enriquez this Court held that evidence of previous possession or use of marihuana was not admissible to show intent to sell heroin.

Enriquez is the only decision cited by appellant upon the point in question. Appellant states:

"Here, as in the Enriquez case, there is no similarity between the act charged with the antecedent act."

(Appellant's Opening Brief, p. 22).

Actually, Enriquez is excellent authority in support of the ruling of the trial Court herein. Speaking for the Court in that opinion, Judge Barnes stated:

"There is no question but that on the limited issue of intent, it is not error to permit the introduction of evidence as to the prior possession of heroin by any defendant charged with possession, transportation or sale of heroin, or facilitating such possession, transportation or sale." (at p. 713, emphasis added).

The opinion also states (at p. 714) that proof of previous sale of marihuana might be admissible to show intent to sell heroin (at p. 714).

Teasley, supra, also notes the general rule that evidence of another crime is admissible "to prove the crime charged" (at p. 467).

The evidence also was admissible to show motive.

Cohen v. United States, supra;

Moore v. United States, 150 U.S. 57 (1893).

"Evidence of the motive which suggests the doing of the act constituting the crime charged is always admissible, and this is true even though such evidence tends to show the commission of another crime, or constitutes proof of the commission of another crime." I Wharton's Criminal Evidence (12th Ed.) 529-30 (Section 239).

"Proof of other crimes similar in nature is admissible to show motive and intent."

Babb v. United States, 351 F.2d 863, 867
(8th Cir. 1965).

The evidence of the offer to sell marihuana not only was admissible as evidence of commission of the crime charged, admissible to show motive, and admissible to show intent, but it also was admissible as having a natural tendency to corroborate or supplement direct evidence (i. e. , Gold's testimony).

"An exception to the rule which excludes evidence of other offenses is made in those cases in which the evidence offered has a natural tendency to corroborate or supplement admitted evidence. . . ."

Hass v. United States, 31 F.2d 13, 15
(9th Cir. 1929).

The same rule appears in Schwartz v. United States, 160 F.2d 718, 721 (9th Cir. 1947).

As an indication that Ronna Adrian's testimony was highly prejudicial to appellant, appellant notes that she had been arrested in connection with marihuana. The fact of the arrest was introduced into the record by appellant, not by appellee [R. T. 154].

Appellant states that the indication that he was a marihuana peddler would be extremely shocking to the jury. However, the rules regarding admissibility of evidence of other crimes are not affected by the seriousness of those other crimes. This Court

has upheld admission of evidence of sales of narcotics or marihuana where the charges were limited to non-commercial offenses.

Wright v. United States, supra;

Ng Sing v. United States, supra.

The Supreme Court has extended the rule to include evidence of murder, a crime much more shocking than an offer to sell marihuana. In Moore, supra, the evidence of the unalleged crime tended to show murder with the additional disgusting fact that the defendant's brother was wearing boots taken from the murdered man. The Supreme Court unanimously ruled that the evidence was admissible to show motive.

Before leaving the subject, it should be noted that admissibility of evidence of unalleged crimes is not affected by the fact that the unalleged crimes may be subsequent to the alleged crimes.

Teasley v. United States, supra, at 467;

Anthony v. United States, supra, at 53.

It also should be noted that where the evidence is admissible it may be offered by the prosecution without waiting for the defense to specifically interject the issue, such as lack of intent, lack of knowledge, etc.

Hamman v. United States, 340 F.2d 145, 149

(9th Cir. 1965).

In conclusion, it is respectfully submitted that the trial Court's ruling upon the questioned evidence was entirely consistent with numerous decisions of this Court and was not in any way inconsistent with the only decision cited by appellant as authority for

his position.

B. THE TRIAL COURT DID NOT COMMIT
ERROR BY FAILURE TO GIVE A
CAUTIONARY INSTRUCTION TO THE
JURY.

Appellant contends that the trial Court committed error by failing to give a cautionary instruction in regard to evidence of appellant's offer to sell marihuana to Ronna Adrian. Although a cautionary instruction was given [R. T. 320], appellant argues that the instruction numbered 4.08 in 27 Federal Rules Decisions 80 should have been given.

However, Instruction 4.08 does not apply to the facts of the instant case. This instruction includes the following paragraph:

"Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular acts charged in the particular count of the indictment -- information then under deliberation." (Emphasis added).

Appellant was charged in Count One with conspiracy and in Count Two with aiding, abetting, etc. Had the suggested instruction been given, the jurors would have been told that they could not consider Ronna Adrian's testimony unless they first

found that the other evidence, standing alone, established beyond a reasonable doubt that the accused conspired and aided and abetted (i. e., "did the particular acts charged in the particular count of the indictment -- information . . ."). In other words, they could not consider the evidence until they first found the defendant guilty as charged. This would be an absurd instruction. There would be no need for the additional evidence if the jury was required to decide all basic issues in the case before considering the additional evidence. It is obvious that this instruction was not intended to apply in conspiracy cases. Furthermore, appellee has been unable to locate a single case holding that the instruction is required if it does apply to the factual situation. Enriquez v. United States, supra, involves a similar instruction, but it does not appear that the decision is authority for the proposition that the instruction is a proper one.

Appellant has failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, which provides in part as follows:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (Emphasis added).

Appellant did not "distinctly" state his position in the trial Court. He did request Instruction 4.08 and then immediately criticized the same instruction:



"THE COURT: Well, which do you want?

"MR. STEWARD 7/: 4.08, your Honor, is what we would request. Although actually it wasn't an act of a similar nature. There is no connection between conspiracy to smuggle marijuana and a proposed sale of marijuana." [R. T. 245].

If it be assumed, arguendo, that the general philosophy of Instruction 4.08 is applicable to conspiracy and aiding and abetting charges, then the proper instruction would have been Instruction 4.07 at 27 Federal Rules Decisions 79. Both instructions refer to intent and are not concerned with motive or other matters. Instruction 4.07 involves evidence of an earlier offense of a like nature, while Instruction 4.08 involves evidence of an earlier act of a like nature. This is the primary distinction between the two instructions. The evidence in the instant case involved an offense, since an offer to sell marihuana constitutes a felony under California Health and Safety Code Section 11531. Consequently, assuming the applicability of either Instruction 4.07 or Instruction 4.08, the former would be the proper instruction. However, appellant not only failed to request Instruction 4.07 but actually rejected it:

"THE COURT: You don't want 4.07?

"MR. STEWARD: No, because as your Honor points out it is not of a same or similar nature.

7/ Counsel for appellant.

"THE COURT: Well, this is 4.08. I am talking about 4.07.

"MR. STEWARD: Same or similar offense. One uses the word 'offense' and the other one 'act'.

"THE COURT: Yes.

"MR. STEWARD: But they are both having to do with same or similar offense or same or similar act.

"THE COURT: No. 4.07 doesn't. You can leave out that 'of like nature' but you understand juries, I think, better than most of us.

"MR. STEWARD: I thank your Honor for your kind words, and I wish it were true.

"Beyond, what I have stated, your Honor, we would have no objections to the instructions your Honor had indicated." [R. T. 250].

Prior to this colloquy, as already indicated, counsel for appellant had requested Instruction 4.08 and then criticized the instruction in the same breath [R. T. 245]. Shortly afterwards, he stated as follows:

"Well, I hate to highlight the testimony, but then again I think the jury should be advised that he is not on trial for anything other than conspiracy to smuggle marijuana, and that any other act, any evidence of anything else, he is not on trial for that." [R. T. 248].

An instruction upon this point was given [R. T. 317]. After this request, appellant's counsel turned down the Court's suggestion that he frame an instruction [R. T. 248]. He later stated:

"Well, not seeing an instruction that I feel covers the matter, I won't make any further requests, your Honor." [R. T. 250].

This statement would naturally lead the Court to believe that appellant was not requesting Instruction 4.08. This conclusion is supported by subsequent events. After the instructions were given, appellant's counsel objected to the instructions upon the ground that the testimony of Ronna Adrian had "nothing to do with an intent . . ." [R. T. 325]. However, Instruction 4.08, which appellant now prefers, is an instruction upon intent.

Furthermore, at the hearing of the motion for judgment of acquittal or motion for a new trial, the following colloquy occurred in regard to a cautionary instruction relating to Ronna Adrian's testimony:

"THE COURT: I don't recall that any was offered.

"MR. STEWARD: Well, there is no question but what none was offered because I recall we had quite a colloquy here, both before the instructions and I believe there after the instructions were given, concerning this particular instruction, and I know that your Honor invited me to submit one, and I was of the opinion then

and now that there wasn't much that I could do about it.

"THE COURT: No, and you didn't want me to.

"MR. STEWARD: Yes.

"THE COURT: And as I recall I did ask you to draft one.

"MR. STEWARD: Yes, you did, your Honor, and I took the position that I didn't know how you could cover, say, anything that could occur that I felt was an error at the time, and Mr. Johnson didn't submit anything." [R. T. 340, emphasis added].

It is clear that appellant failed to comply with the provisions of Rule 30. While there may be exceptions to these requirements in rare cases, it is respectfully submitted that this is not a case of "plain error" excusing failure to comply with Rule 30. Rule 52 of the Federal Rules of Criminal Procedure provides as follows:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In reference to Rule 52, this Court has stated:

" 'Plain' means 'clearly or plainly apparent' and in this sense it has been stated that what is plain

can be seen at the first glance without search or study."

Percifield v. United States, 241 F.2d 225, 228
(9th Cir. 1957).

Considering that appellant requests the wrong instruction, that it is highly probable that the basic philosophy of either instruction would not apply in conspiracy cases, that appellant apparently withdrew the request (subsequently admitting that he requested no instruction upon the subject), it is evidence that this is not a case of "plain error" that is "clearly or plainly apparent" and "can be seen at the first glance . . .". Indeed, it does not appear to involve error at all.

C. EVIDENCE OBTAINED AT APPELLANT'S
RESIDENCE WAS NOT UNLAWFULLY
OBTAINED.

Appellant contends that he was unlawfully arrested on April 19, 1963, and that certain statements and a telephone book (Government Exhibit 7 for Identification) should not have been received in evidence. Actually, the telephone book was not received in evidence [R. T. 342]. After it was mentioned by Sergeant Beckmann, it was actually produced in court and marked for identification at the instigation of appellant's counsel [R. T. 165, 167-168].

Appellant's arrest occurred after the officers went to his house to talk to him [R. T. 188]. Sergeant Beckmann, who made the actual entry after observing Taylor's flight, had been informed

by Deputy Sheriff Lesnick that appellant was dealing in marihuana from his residence [R. T. 184, 185, 196]. He had been informed by Sergeant Camacho that Martin Gold was selling marihuana for appellant [R. T. 184, 187]. He also knew that appellant had been arrested in March with six pounds of marihuana and six or seven pounds of peyote, and he knew the details of Gold's arrest at San Ysidro and information given to Customs Agent Greppin by persons arrested by him [R. T. 184, 187].

When appellant answered the officers' knock upon the door, Taylor, one of several people sitting in the living room, grabbed a white object from the table next to him and ran into the bedroom [R. T. 185, 190]. Sergeant Beckmann forced his way through the door, ran into the bedroom, and recovered marihuana there. It was not in Taylor's possession. Additional marihuana was found in the ivy outside of the premises [R. T. 185, 190, 195].

Sergeant Beckmann arrested appellant and then picked up the telephone book in question [R. T. 167-168, 191-192]. He mentioned the telephone book in his testimony, stating that appellant denied knowing Restuccia and Martin Gold, that he told appellant that the names of Restuccia and Gold were in the telephone book, and that appellant denied this [R. T. 165-166].

Sergeant Beckmann also testified that appellant stated that he had gone shopping with his wife on April 13, 1963, and that he had borrowed a vehicle on April 14 but would not name the person from whom he borrowed it [R. T. 75-76, 165-166].

In considering the legality of appellant's arrest, special

weight must be given to the law of California. The Supreme Court of the United States has held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity".

United States v. Di Re, 332 U.S. 581, 589 (1948).

Although Mapp v. Ohio, 367 U.S. 643 (1961), applied Fourth Amendment standards to the states, the Di Re ruling is one of those standards, and it refers the matter to state law. Furthermore, Mapp "implied no total obliteration of state laws relating to arrests and searches in favor of federal law".

Ker v. California, 374 U.S. 23, 31 (1963).

Consequently, had Agent Greppin, a federal officer, controlled the arrest decision, Di Re would refer the matter to state law, as there appears to be no applicable federal statute concerning probable cause for an arrest by a Customs officer. ^{8/} However, it was a state officer who forced the entry and made the arrest [R. T. 185, 191-192], so there is additional compelling reason to refer to the law of California. Reference also will be made to Federal decisions to demonstrate that the actions of the officers were entirely reasonable and lawful under the state and federal decisions.

Before going to appellant's home for purposes of questioning,

^{8/} 19 U.S.C.A. 1581 refers to arrest by Customs officers but does not mention probable cause or reasonable cause.

26 U.S.C.A. 7607, referring to arrests by Bureau of Narcotics agents, does not apply to Customs.

Sergeant Beckmann had been informed by Deputy Sheriff Lesnick that appellant was dealing in marihuana from his home. This fact alone constituted reasonable cause to arrest without a warrant. An officer is a reliable informant.

People v. Lopez, 196 Cal. App.2d 651 (1961).

An arrest may be based upon information provided by a single reliable informant.

People v. Garnett, 148 Cal. App.2d 280, 284 (1957);

Trowbridge v. Superior Court, 144 Cal. App.2d 13, 22-23 (1956).

A California peace officer may arrest "Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed".

California Penal Code Section 836.

"California courts are very liberal in essaying the acts which constitute probable cause."

United States v. Bell, 48 F. Supp. 986, footnote at 993 (S. D. Cal. 1943).

It is entirely proper for officers to go to the residence of a suspect in order to question him.

People v. Torres, 56 Cal.2d 864, 867 (1961);

People v. Michael, 45 Cal.2d 751, 754 (1955);

Davis v. United States, 327 F.2d 301 (9th Cir. 1964).

The fact that five officers were involved does not affect the validity of their visit. In People v. Michael, supra, four officers from three different agencies went to the home of the suspect, a

female, in order to interview her. This conduct was held to be proper.

The fact that appellant's home was surrounded also is not significant. It is common knowledge that officers are subjected to frequent assault in Los Angeles County. There is no evidence that the officers hoped that the interview would be productive of the discovery of physical evidence. However, even if they did have optimistic hopes, their conduct would not be unreasonable.

Davis, supra, at 303.

As previously noted, the information given to Sergeant Beckmann by Deputy Sheriff Lesnick alone constituted sufficient cause for an arrest had Sergeant Beckmann been so inclined. However, he also had additional information of considerable consequence, provided by Sergeant Camacho (that Gold was selling marihuana for appellant) and by Agent Greppin. When he saw Taylor grab a white object and flee after the officers identified themselves, he was entirely justified in his conclusion that Taylor was planning to dispose of contraband, which conclusion took into consideration his own past experiences and observations as a narcotics investigator for approximately ten years [R. T. 190].

At this point, Sergeant Beckmann had reasonable cause to arrest both Taylor and appellant. The court found that there was probable cause [R. T. 197]. The entry was necessary in order to arrest appellant and prevent the disposal of contraband.

A forcible entry may be made without announcing the purpose of entry where there is a risk of disposal of contraband.

People v. Hammond, 54 Cal.2d 846, 854 (1960);
People v. Torres, supra, 56 Cal.2d 864, 866-67
(1961), cert. denied, 369 U.S. 838 (1962);
Ker v. California, supra, 374 U.S. 23, 37-41.

In Ker, the officers legitimately feared disposal of contraband and entered without permission or announcement although no one was seen to flee to another part of the apartment. Their conduct was considered to be reasonable. In Torres, supra, the officers sent to the suspect's home to interview her, entered, pursued a woman in flight toward the bathroom, and seized suspected narcotics. Their conduct was upheld by the appellate court.

The discovery of marihuana in the bedroom resulted from a search incident to Taylor's arrest. While it is not clear whether the arrest preceded or followed the search, this is immaterial under California law so long as there is reasonable cause to arrest at the time of the search.

People v. Torres, supra;
People v. Luna, 155 Cal. App.2d 493, 495 (1957).

This Court also has held that where there is probable cause for an arrest without a warrant, it is immaterial that the search precedes the arrest.

Busby v. United States, 296 F.2d 328, 332
(9th Cir. 1961), cert. denied, 369 U.S. 876
(1962);

Fernandez v. United States, 321 F.2d 283,
footnote at 287 (9th Cir. 1963). ^{9/}

The validity of the seizure of the marihuana is not affected by the fact that the white object which was sought probably was not contraband. Officers may seize contraband found during a valid search involving a separate alleged crime.

People v. Shafer, 183 Cal. App.2d 127, 129 (1960). Evidence is not rendered inadmissible by the fact that it is evidence of a different crime than the one suspected at the time of arrest and search.

People v. Dickenson, 210 Cal. App.2d 127, 135 (1962). An entry that is lawful and reasonable when it occurs does not change its character and become evil because it is later discovered that the officer's reasonable belief was erroneous.

Ker, supra, footnote 12 at pp. 40-41.

Officers who make a valid entry upon property may seize contraband although they were not aware that such property was on the premises when the search was initiated.

Harris v. United States, 331 U.S. 145, 155 (1947).

Appellant relies upon Wong Sun v. United States, 371 U.S. 471 (1963). However, in Wong Sun the officers had no reason to believe that they were at the residence or place of business of the suspect. They were looking for " 'Blackie Toy', proprietor of a

^{9/} Of course, if the marihuana was in open view in the bedroom, there was no "search". Appellant did not meet his burden of proof here and possibly does not contest this point.



laundry on Leavenworth Street." (at p. 473). The informant, who was not known to be reliable, gave information which "merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one 'Blackie Toy's' laundry -- and whether by chance or other means (the record does not say) they came upon petitioner Toy's laundry, which bore not his name over the door, but the unrevealing label 'Oye's' " (at pp. 480-81). Thus mere flight in Wong Sun did not provide probable cause. The facts of the instant case are entirely different. Not only was there a vast amount of probable cause in regard to appellant's criminal activities, but there also was the grabbing of the white object when the flight commenced.

Since the marihuana that was found in the bedroom of appellant's home was not in Taylor's possession, although he had a white object which was not contraband [R. T. 195], the officers had additional reasonable cause to arrest appellant for possession of marihuana.

Davis, supra, at 306.

Since appellant's arrest was lawful, his exculpatory false statements were admissible in evidence.

Assuming, for purposes of argument only, that the arrest of appellant was unlawful, it does not necessarily follow that his exculpatory statements constituted the "fruit" of the arrest. Not every statement made by an arrested person shortly after his unlawful arrest is the product of the arrest.

Burke v. United States, 328 F.2d 399, 402 (1st Cir.

1964);

Hollingsworth v. United States, 321 F.2d 342, 350-51
(10th Cir. 1963);

United States v. Zimple, 318 F.2d 676, 680 (7th
Cir. 1963), cert. denied, 375 U.S. 868
(1963).

Furthermore, even if it be assumed, arguendo, that the arrest of appellant was unlawful and that the statements constituted the product of the arrest, it is respectfully submitted that appellant waived his objection by failure to object until November 22, 1965, more than 2-1/2 years after the arrest. When the testimony concerning the same statements was offered at the first trial, on May 20, 1964 [R. T. 470-72, first trial], there was no objection. Appellant earlier had made a general objection to evidence of one of these statements, without making any reference to legality of the arrest [R. T. 459, first trial].

Unless extenuating circumstances exist, an objection to an alleged unlawful search is waived by failure to make a timely motion to suppress evidence.

Sandez v. United States, 239 F.2d 239, 242 (9th
Cir. 1956).

There are no extenuating circumstances here.

D. THE TELEPHONE BOOK WAS PROPERLY
SEIZED AS AN INSTRUMENTALITY OF
CRIME.

Appellant contends that regardless of the legality of the officer's entry and the arrest, the address book or telephone book (Government Exhibit 7 for Identification) was illegally seized because it constituted mere evidence and was not subject to seizure as incident to an arrest.

It is respectfully submitted that the book was subject to seizure as an instrumentality of crime. It contained the names of co-conspirator Gold and of Restuccia. The vehicle employed in the smuggling was obtained from Restuccia [R. T. 138-39, 165-66]. Since it was vitally necessary for appellant to have a means of contacting Gold and Restuccia, the telephone book was an instrumentality of the crime.

Things connected with a crime as the means by which it was committed are subject to search and seizure incident to an arrest without a warrant.

Agnello v. United States, 269 U.S. 20, 30 (1925).

The California Supreme Court has upheld the seizure of a telephone directory sheet with names and telephone numbers of victims as a seizure incident to a lawful arrest.

People v. Winston, 46 Cal.2d 151, 155, 162-63 (1956).

It is respectfully submitted that the trial Court was correct in ruling [R. T. 345-46] that the telephone book was an instrumentality of crime.

E. ASSUMING, ARGUENDO, THAT THE EXHIBIT
 IN QUESTION WAS NOT AN INSTRUMENTALITY
 OF CRIME, IT WAS NEVERTHELESS SUBJECT
 TO SEIZURE.

If it be assumed, for purposes of argument, that the telephone book was not an instrumentality of crime, it was subject to proper seizure as evidence.

"When one is lawfully arrested, all property found on his person or in his control, which may tend to prove the offense with which he is charged, may be seized and held as evidence against him."

Varon, Searches, Seizures and Immunities, Vol. I,
p. 192.

"The principal purpose of the search is to discover evidence of criminal conduct, and the right to search depends on the validity of the arrest."

Witkin, California Criminal Procedure, p. 109
(Emphasis added).

Items which are merely evidentiary may be seized incident to a lawful arrest.

Morales v. United States, 344 F.2d 846, 851
(9th Cir. 1965);

Taglavore v. United States, 291 F.2d 262, 265
(9th Cir. 1961);

Charles v. United States, 278 F.2d 386, 388 (9th Cir.
1960);

Sayers v. United States, 2 F.2d 146, 147 (9th Cir.
1924);

Shettel v. United States, 113 F.2d 34, 35 (C. A. D. C.
1940);

Moder v. United States, 64 F.2d 703, 704
(C. A. D. C. 1933);

Estabrook v. United States, 28 F.2d 150, 153
(8th Cir. 1928);

Maynard v. United States, 23 F.2d 141, 144
(C. A. D. C. 1927);

United States v. Bell, 48 F.Supp. 986, footnote at
997 (S. D. Cal. 1943).

" 'The right of search extends to the premises
in control of the defendant arrested, and authorizes the
seizure of that which is evidentiary of the crime.' "

Morales, supra, at 851.

"In any such search, not only may the instruments
and fruits of crime be seized, but mere evidentiary
articles, including papers incidentally discovered, may
be likewise seized. "

Sayers, supra, at 147.

The Supreme Court of the United States recently emphasized
the need to recover and preserve evidence incident to arrest as a

value to be recognized. In Schmerber v. California, 34 Law Week 4586, decided June 20, 1966, the Supreme Court upheld the forcible removal of a blood alcohol sample from a suspect arrested upon a charge involving alcoholic influence. The invasion of the suspect's body was upheld because the removal of blood would prevent the threatened destruction of evidence (34 Law Week 4590). It is noteworthy that the opinion refers to "evidence" rather than instrumentality of crime." Of course, blood would not be an instrumentality of crime, although the alcohol in the blood might fit that classification.

In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court also emphasized the need to preserve evidence, at the time of arrest, implying that rules governing forcible entry to make arrests would not apply where there is imminent destruction of vital evidence (at p. 484).

Appellant quotes dictum in Harris v. United States, 331 U.S. 145, 154 (1947), to the effect that merely evidentiary materials may not be seized incident to an arrest. This dictum cites a number of cases, beginning with Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); and Gouled v. United States, 255 U.S. 298 (1921). A review of these decisions demonstrates that they do not support the dictum in Harris.

Gouled relies upon Boyd and Weeks to support the proposition that a search warrant may not be issued for items that are merely evidentiary. Assuming that this statement of the law is

correct (although California Penal Code Section 1524 has authorized a search warrant for mere evidence since 1957)^{10/}, it does not operate to prevent a seizure of evidence as distinguished from a search for evidence.

Boyd, supra, is primarily concerned with self-incrimination upon a court order to produce private papers, etc. The decision indicates that there cannot be a search for mere evidence, but it does not answer the question of legality of seizure of evidence properly discovered during a proper search for weapons, etc.

Weeks, supra, cited in Harris, is authority supporting appellee's position herein. Contrary to the dictum in Harris, Weeks holds that officers have the right, "always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime."

Weeks, supra, at p. 392 (Emphasis added).

Weeks also refers to "burglar's tools or other proofs of guilt found upon his arrest within the control of the accused." (at p. 392, emphasis added).

In Weeks, the seizure was unreasonable because the search itself was unreasonable. The Supreme Court recently cited Weeks to support the rule that "fruits or evidences of crime" may be seized incident to a lawful arrest.

^{10/} This statute was recently upheld once again in People v. Potter, 49 Cal. Rptr. 892, 899 (March 7, 1966)

Schmerber, supra, 34 Law Week 4586, 4589.

An earlier decision cited Weeks and other cases to support the same general rule:

"Property seized in connection with a lawful arrest, and which is held merely as evidence of crime, does not come within the protection of the provisions of the Constitution prohibiting search and seizure without a search warrant."

Swan v. United States, 295 Fed. 921, 922

(C. A. D. C. 1923).

F. ASSUMING, ARGUENDO, THAT THE EXHIBIT
IN QUESTION WAS NOT LAWFULLY SEIZED,
ANY ERROR REGARDING THE EXHIBIT WAS
HARMLESS.

Assuming, arguendo, that error was committed in regard to Government Exhibit 7 for Identification, the alleged error was harmless under Rule 52(a) of the Federal Rules of Criminal Procedure.

The harmless error rule is applicable to search and seizure issues under the appropriate circumstances.

Hernandez v. United States, 353 F.2d 624, 628

(9th Cir. 1965);

Westover v. United States, 342 F.2d 684, 689-90

(9th Cir. 1965);

Burge v. United States, 342 F.2d 408, 413

(9th Cir. 1965).

If it be assumed that the officers conducted a lawful search, and if it also be assumed that they had no right to seize the book in question, the evidence that was offered at the trial would still be admissible. The book was not offered or received in evidence at the trial. Had the officers left the book behind at appellant's residence, the testimony attacked by appellant would still be admissible. This testimony merely consists of Sergeant Beckmann's statements to the effect that he told appellant that the names of Restuccia and Martin Gold were in appellant's telephone book [R. T. 165-66]. Sergeant Beckmann later conceded that the book possibly belonged to appellant's wife [R. T. 167]. Appellant testified that the exhibit looked like his wife's phone book [R. T. 239]. Government counsel told the jury that it was not claimed that the book belonged to appellant [R. T. 257].

Even if the officers did not have the right to seize the book, which is not conceded, they could testify concerning knowledge lawfully obtained (i. e., that the names of Restuccia and Gold were in the book).

People v. Citrino, 46 Cal. 2d 284, 288 (1956).

Considering the small significance of "these trifling bits of evidence" (Burge, supra, at 413), it is respectfully submitted that the harmless error rule would apply in the event that any error did occur.

G. ASSUMING, ARGUENDO, THAT THE
 EXHIBIT IN QUESTION WAS NOT LAWFULLY
 SEIZED, APPELLANT HAD NO STANDING
 TO OBJECT.

Appellant argues that the seizure of the telephone book was unlawful. However, if it be assumed that the search was lawful, appellant has no standing to object to the seizure, as he failed to establish any interest in the property (i. e., the telephone book). On the contrary, he claimed that the book looked like his wife's phone book [R. T. 239].

A party aggrieved by an alleged unlawful seizure must establish standing to object by claiming ownership or a substantial possessory interest.

Diaz-Rosendo v. United States, 357 F.2d 124,
130-31 (9th Cir. 1966)

While this requirement is frequently satisfied by showing an interest in the premises searched rather than the property seized, it is obvious that standing would not be established by merely claiming an interest in the premises if the premises were lawfully entered and searched.

H. ASSUMING, ARGUENDO, THAT THE EXHIBIT
 IN QUESTION WAS NOT LAWFULLY SEIZED,
 APPELLANT WAIVED THE OBJECTION BY
 FAILING TO MAKE A TIMELY OBJECTION.

Appellant objected at trial to the reference to the telephone book upon the ground that it was seized as a result of an unlawful entry or unlawful arrest [R. T. 176-79]. He now makes the additional objection that regardless of the legality of the search, the book was illegally seized because it allegedly was not an instrumentality or fruit of crime. This complex issue was not presented to the trial Court as an objection until appellant filed his "Points and Authorities In Support of Motion For Judgment of Acquittal or New Trial" on December 10, 1965 [C. T. 66], 17 days after the questioned testimony was heard.

An issue must be raised in timely fashion in the trial Court.

Ramirez v. United States, 294 F.2d 277, 283
(9th Cir. 1961);

Stein v. United States, 166 F.2d 851, 855 (9th Cir.
1948), cert.denied, 334 U.S. 844 (1948).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio
ROBERT L. BROSIO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EASON,

Petitioner-Appellant,

v.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Respondent-Appellee.

No. 20938 ✓

BRIEF OF APPELLEE

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1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 JAMES EASON,

5 Petitioner-Appellant,

6 v.

7 LAWRENCE E. WILSON, Warden,
8 California State Prison,
9 San Quentin, California,

Respondent-Appellee.

No. 20938

10
11 BRIEF OF APPELLEE

12 JURISDICTION

13 The jurisdiction of the United States District
14 Court to entertain appellant's petition for a writ of
15 habeas corpus was conferred by Title 28, United States Code,
16 section 2241. The jurisdiction of this Court is conferred
17 by Title 28, United States Code, section 2253, which makes
18 a final order in a habeas corpus proceeding reviewable in
19 the Court of Appeals when a certificate of probable cause
20 has issued.

21 STATEMENT OF THE CASE

22 A. Proceedings in the state courts.

23 On January 4, 1947, appellant, James Eason, while
24 represented by counsel, pleaded guilty to two counts of
25 robbery; the degree for each offense was found to be first
26 degree, and appellant was sentenced to state prison for the



1 term prescribed by law, the two sentences to run concurrently
2 with each other (CT 4).*

3 Appellant never appealed from the judgment of
4 conviction (CT 2). However, petitions for writs of habeas
5 corpus were filed in the Superior Court of Marin County, in
6 the District Court of Appeal of the State of California, and
7 in the Supreme Court of the State of California (CT 8). The
8 writs were denied without opinion on April 27, 1961, June 20,
9 1961, and August 16, 1961, respectively (CT 9). Substantially
10 the same factual and legal issues presented to the District
11 Court were raised in those petitions.

12 B. Proceedings in the federal courts.

13 On November 11, 1965, appellant filed an application
14 for writ of habeas corpus in the United States District Court
15 for the Northern District of California, Southern Division
16 (CT 1-11). On January 14, 1966, the District Court denied
17 the petition for a writ of habeas corpus on the grounds that
18 there had been no ex post facto application of California
19 Penal Code section 671 so as to make appellant's confinement
20 unconstitutional, and that petitioner's contention that the
21 California Adult Authority is without power to fix his
22 sentence pursuant to his 1947 conviction involves a question
23 of interpreting the indeterminate sentence laws of
24 California -- a matter beyond the scope of federal habeas

25 * As hereinafter used, "CT" refers to the Clerk's Transcript
26 of Record filed in this Court, constituting the United States
District Court Clerk's record on appeal.



1 corpus (CT 28). However, on March 23, 1966, the court
2 below granted petitioner a certificate of probable cause
3 to appeal in forma pauperis (CT 44, 48).

4 SUMMARY OF APPELLEE'S ARGUMENT

5 The District Court did not err in holding that there
6 has been no ex post facto application of California Penal
7 Code section 671.

8 ARGUMENT

9 THE DISTRICT COURT DID NOT ERR IN HOLDING
10 THAT THERE HAS BEEN NO EX POST FACTO
11 APPLICATION OF CALIFORNIA PENAL CODE
12 SECTION 671

13 Appellant's contention in the District Court, repeated
14 here, is that he is confined pursuant to an ex post facto
15 application of California's Indeterminate Sentence Law. The
16 crux of his argument is that California Penal Code section 671,
17 as amended in 1951, now assesses a mandatory life sentence for
18 first degree robbery, whereas when he committed the crime and
19 was sentenced therefor, a mandatory life sentence was not the
20 punishment prescribed by law (AOB 10, 11).

21 The fallacy of appellant's argument is his reliance
22 on section 671 of the Penal Code^{1/} as it existed in 1947.

23 1. "Whenever any person is declared punishable for
24 a crime by imprisonment in the state prison for a term
25 not less than any specified number of years, and no limit
to the duration of such imprisonment is declared, the court
authorized to pronounce judgment upon such conviction may,
in its discretion, sentence such offender to imprisonment
during his natural life, or for any number of years not
less than prescribed." Cal.Pen.Code § 671.

1 That section had been enacted in 1872. As a matter of
2 state law, that portion of section 671, permitting the
3 sentencing court to sentence an offender for any number
4 of years not less than that prescribed by law, had been
5 superseded in that respect by the enactment of the
6 Indeterminate Sentence Act (Penal Code section 1168), which
7 was subsequently passed in 1927, and which specifically
8 provided that "the court in imposing the sentence shall
9 not fix the term or duration as the period of imprisonment."
10 (Italics added.) Cal.Pen.Code § 1168.^{2/} The California cases
11 on the subject unanimously so held. People v. Stratton, 136
12 Cal.App. 201 (1934); People v. Wells, 68 Cal.App.2d 476 (1945).
13 Hence, the 1951 amendment to section 671 (adopted in 1872),
14 to conform said section with the 1927 Indeterminate Sentence
15 Law (Penal Code section 1168), did no more than codify case
16 law which was clearly in existence at the time appellant
17 committed the offense for which he is presently confined.^{3/}

18 2. The District Court was incorrect in stating by
19 way of dictum, that the trial court was permitted to fix
20 a maximum sentence under California Penal Code section 671
at the time of sentencing in 1947 (CT 28).

21 3. "It was not the duty of the trial judge to definitely
22 fix the term of imprisonment . . . as provided by section
671 of the Penal Code.

23 ". . . section 1168, . . . without direct reference
24 to section 671, supra, suspends the operation thereof by
25 necessary implication. The very first sentence provides
that the trial court shall not fix the term or duration
of the period of imprisonment." (Italics added.) People v.
Wells, 68 Cal.App.2d 476, 484-85 (1945).



1 Appellant, contending that the District Court
2 erred in holding that the Adult Authority was empowered
3 to determine and redetermine the length of appellant's
4 sentence, erroneously concludes that he had a vested right
5 to serve only the minimum term of imprisonment, i.e., five
6 years, since the sentencing court did not impose a greater
7 penalty (AOB 18-19). This contention, however, is nothing
8 more than an attack on the Indeterminate Sentence Law itself,
9 which has long been held to be constitutional. Cf. People v.
10 Sama, 189 Cal. 153, 156 (1922); In re Collins, 198 Cal. 508
11 (1926). In addition, the question would not seem to involve
12 a federal question, but rather one of purely local nature:
13 the interpretation of a state sentencing statute aimed at
14 rehabilitation. In re Costello, 262 F.2d 214 (9th Cir. 1958).

15 Appellant has not shown an ex post facto application
16 of sections 671, 1168, or 3020 of the California Penal
17 Code, nor alleged facts to entitle him to federal habeas
18 corpus relief.

19 CONCLUSION

20 For the reasons stated, it is respectfully submitted
21 that the order of the District Court denying appellant's petition
22 for writ of habeas corpus be affirmed.

23 Dated: July 15, 1966.

24 THOMAS C. LYNCH, Attorney General
of the State of California

25 ROBERT R. GRANUCCI,
26 Deputy Attorney General

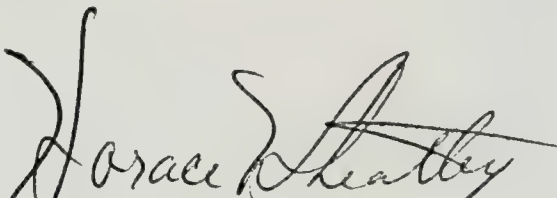
HORACE WHEATLEY,
Deputy Attorney General
Attorneys for Respondent-Appellee.

1 CERTIFICATE OF COUNSEL

2 I certify that in connection with the
3 preparation of this brief, I have examined Rules 18
4 and 19 of the United States Court of Appeals for the
5 Ninth Circuit and that in my opinion this brief is in
6 full compliance with these rules.

7 DATED: San Francisco, California.

8 July 15, 1966

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11 HORACE WHEATLEY
12 Deputy Attorney General
13 of the State of California
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No. 20,939

See Vol.
3381

In the
United States Court of Appeals
For the Ninth Circuit

WESTERN CONSTRUCTORS, INC.,
a corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

**Petition of Appellee, Southern Pacific Company,
For Rehearing**

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AUG 1967

No. 20,939

In the
United States Court of Appeals
For the Ninth Circuit

WESTERN CONSTRUCTORS, INC.,
a corporation,

Appellant,

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SOUTHERN PACIFIC COMPANY,
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Petition of Appellee, Southern Pacific Company,
For Rehearing

In its Decision of July 10, 1967 the Court of Appeals reversed the judgment of the lower court, by concluding that there was evidence of wanton negligence on the part of the operators of appellee's train. From the following excerpts (pages 6 and 7 of the Decision) this conclusion appears to be based upon (1) the fact that the train approached the private crossing in question at a high rate

of speed *under the circumstances* (63-65 mph), and (2) the possibility that the train operators thereafter failed to apply the train brakes.

“In the light of his testimony that the train’s weight and momentum would prevent the slightest reduction of speed within the distance in question, it seems to us that a jury might have found that there was ‘wanton’ negligence in the circumstances in failing to reduce the speed more than two miles per hour for ‘better control’.”

“As previously recited, the railroad undertook to explain the lack of diminution of speed by emphasis upon the weight and momentum of its equipment. In this connection it should be pointed out that the train consisted of two locomotives and eighty cars. It weighed almost four thousand tons. Negligence, whether ordinary or wanton, is a relative term. The duty of care increases with the degree of danger which should reasonably be apprehended. One is required to conduct his affairs in the light of the reasonably foreseeable consequences of his acts, and the foreseeable consequences of a four thousand-ton freight train’s colliding with any substantial object while traveling at sixty miles per hour are clearly grave.”

“The train’s operators testified that the train’s brakes were applied, but the jury was not, of course, required to accept this testimony.”

“Portions of the tapes from the speed recording devices indicate speed variations which could support an inference that, had the engineer made emergency application of brakes, as he testified that he did at the time when, according to his testimony, he saw the contractor’s vehicle stalled upon the tracks, the train would have slowed considerably before it reached the point of collision. Thus, the evidence did not foreclose a determination that the train’s brakes were not applied. If they were not, one might infer that the train’s operators did not see the stalled vehicle. Fully aware of

the construction work ahead, with the necessary movement of vehicles which caused the engineer himself to realize the need for 'better control' of his train in order to avoid danger which he himself foresaw, the engineer could have been found guilty of wanton negligence in neglecting vigilance or, in the circumstances, operating a four thousand-ton train at a speed of sixty miles per hour and, without the application of brakes, maintaining the speed in heedless disregard of observed danger."

If this were a public crossing located somewhere else, circumstances could be conceived wherein it might be wanton negligence for a train to approach at 60 miles per hour or more. But to so hold under the circumstances of this case is difficult to accept, because of the private crossing agreement, the extraordinary precautions that were provided, and the unlikelihood of encountering a stalled vehicle on the tracks.

There is no implication in the private crossing agreement, entered into gratuitously by the railroad, that it should curtail or delay its operations on account of the contractor's use of the crossing. On the contrary, it was clearly the intendment of the agreement that the crossing would create no impediment to its trains whatever.

Special safety features were provided to prevent an accident at the crossing—automatic warning signals, a flagman, and a special manual warning switch. The accident occurred on straight track and in broad daylight.

None of the contractor's vehicles had ever stalled on the track before. Though the possibility of a vehicle stalling always exists, certainly this cannot be the circumstance that led the Court to reach its wanton negligence conclusion, for this would impose upon the railroad a duty to operate its trains at such a reduced speed so as to be prepared

and able to stop at the crossing for any eventuality. This certainly does violence to the agreement of the parties, particularly if the consequence of failing to comply with such a duty is classifiable as wanton.

In the last two excerpts from its Decision the Court states that there is a permissible inference that the train operators failed to apply the brakes.

The testimony of the engineer and fireman that they did apply the brakes in emergency is confirmed by the testimony of the contractor's employees, and there is no testimony to the contrary. When the train brakes are placed in emergency the headlight of the locomotive automatically turns red. (R.T. 405, 406) The contractor's employees, Kness and Avila, both testified that while they were trying to push the "carryall" on over the tracks they saw the headlight of the train was red. (R.T. 186, 189, 234) When they quit pushing and ran, the train was at the block signal half a mile away. (R.T. 169, 218) There can therefore be no room for a finding that the brakes were not applied, or for an inference that the train's operators failed to see the stalled vehicle. That they did see is further proved by their undisputed testimony that the train whistle was sounding. (R.T. 267)

Inferences to the contrary should not be drawn from speed variations indicated by the speed tape recording alluded to by the Court, for the reason that the tape merely records the variations in speed and does not indicate how far in advance the brakes were applied in order to produce the variations. Absent this knowledge, it is not possible to deduce from the tape how long it takes after the brakes are applied to reduce the speed.

Moreover, the question of whether the brakes were applied or not is immaterial, because there is no competent evi-

dence to show that the train could have been stopped and the collision avoided by their application.

For the foregoing reasons Appellee respectfully petitions the Court for a rehearing of this cause, and requests that, upon such rehearing, the judgment of the United States District Court for the District of Arizona be affirmed.

EVANS, KITCHEL & JENCKES

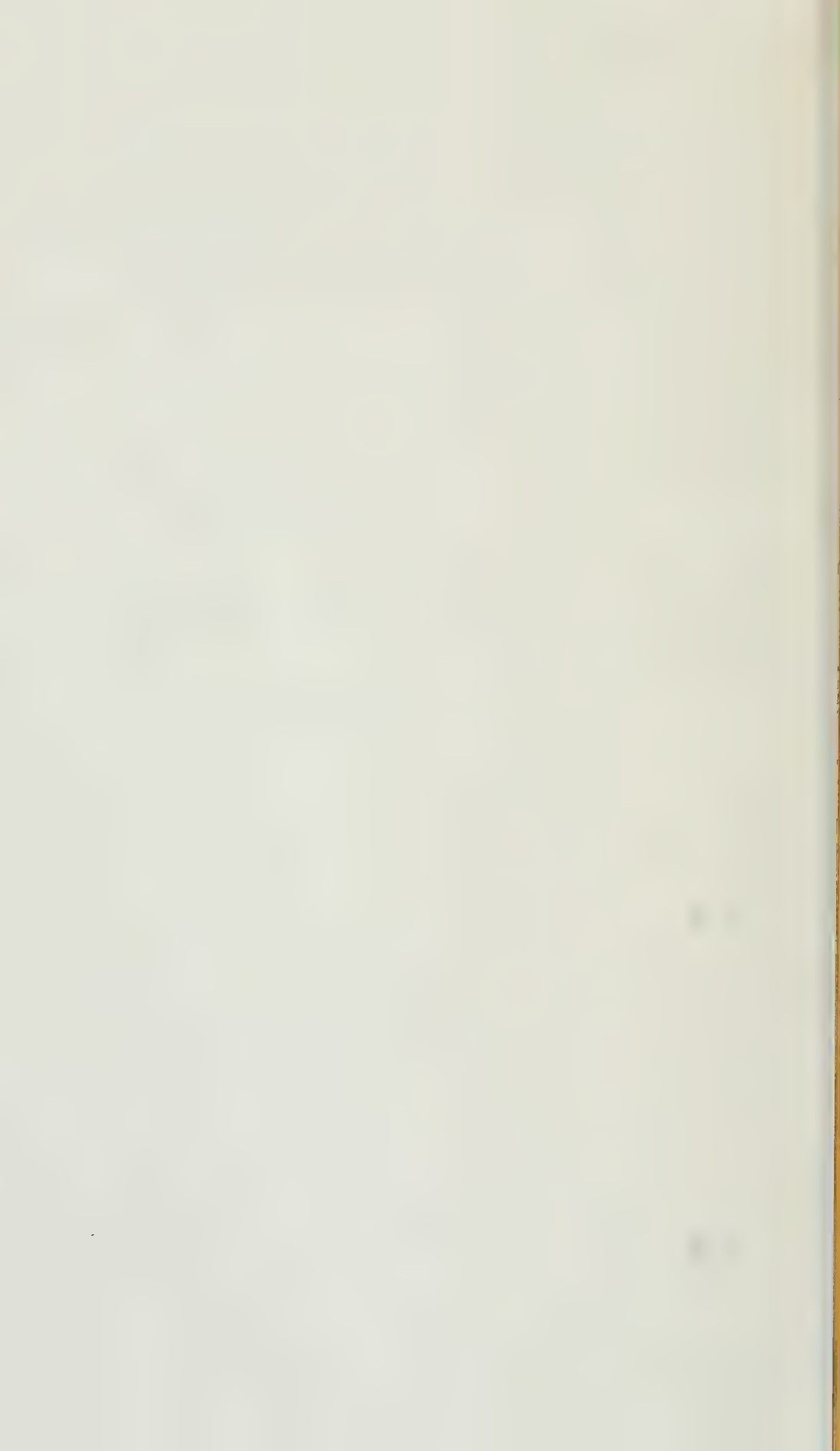
By RALPH J. LESTER

*Attorneys for Appellee
Southern Pacific Company*

363 North First Avenue
Phoenix, Arizona 85003

The undersigned hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and is not interposed for delay.

RALPH J. LESTER
Ralph J. Lester



No. 20942 ✓

See Vol. 3382 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT C. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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FILED

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MAY 19 1967



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No. 20942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT C. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

To the Honorable Frederick G. Hamley and Ben C. Duniway, Judges of the United States Court of Appeals, Ninth Circuit and Judge Copple, District Judge:

Comes Now the Appellant in the above-entitled case, and respectfully prays the court to grant a rehearing.

1. The major issue in the present posture of this case is whether books and records unlawfully seized from the corporation can be introduced in evidence against the president and sole owner of (no stock was issued) the corporation, the only person operating the corporation.

The facts regarding the search and seizure of the records of I.A.L.S. were adequately set forth below (Appellant's Op. Br. pp. 2-5). The record leaves no doubt that Appellant could not have been convicted without the illegally seized items.

This court found that *Jones v. United States*, 362 U.S. 257 (1960) was not controlling and affirmed the conviction of Appellant. *Jones*, concurred in by nine justices, is the only Supreme Court expression on standing in the search and seizure area. Essentially, it abrogated "subtle distinctions . . . of private property law" from the search and seizure area and held that it was no longer necessary to admit possession of goods in order to challenge the seizure of those goods. It was not limited to crimes wherein possession itself is sufficient for conviction.

Prior to *Jones*, an individual in control of a corporation did not have standing to assert the invalidity of a search of the corporation. *Lagow v. United States*, 159 F. 2d 245, 246, Cert. Den. 331 U.S. 858, quoted in the opinion of this court. *Lagow*, was widely followed in the Federal Courts, however, there has never been a Supreme Court decision on this point.

Subsequent to *Jones*, *Lagow* has not been followed by the Federal Judiciary, indeed frequently it has not even been cited in cases involving similar facts. A review of the cases in the various circuits demonstrates the implied repudiation of the standing theory of *Lagow*.

Second Circuit.

Lagow was followed in *United States v. Guterma*, 272 F. 2d 344, at 346 (19....) and *United States v. H.J.K. Theater Corporation* (236 F. 2d 502) (1956) but has not been followed since. In a recent District Court decision, *United States v. Birrell*, 242 F. Supp. 191 (1965) U.S.D.C.N.Y. involving facts almost identical to those in the case at bar, a half-hearted attempt

was made to distinguish *Lagow* and *Guterma*, the court concluding:

“If the distinctions above suggested between *Guterma* and *Lagow* on the one hand and the case at bar on the other are not valid, I would then conclude that *Guterma* and *Lagow* ought not to be followed because *Jones* has left them without authority in such a situation as we have here.” (p. 201).

Fourth Circuit.

United States v. Hopps, 331 F. 2d 332 at 340 (1964) Cert. Den. 379 U.S. 820 suggested *Jones* is inconsistent with rigid adherence to the corporate entity. Although it made no square holding on the problem involved here, the clear implication was that *Lagow* could not be followed.

Fifth Circuit.

Henzel v. United States, 296 F. 2d 650 (1961) again on facts similar to the facts herein, found that *Jones* compelled exclusion of the evidence. *Peel v. United States*, 316 F. 2d 907 at 909 (1963) distinguished *Henzel* because the appellants were not officers and directors nor were they in control of the corporation at the time of seizure but in no sense reaffirmed *Lagow*. *Lagow* was not cited in either case.

Tenth Circuit.

Villano v. United States, 10 F. 2d 680 (1962) found that the liberal trend produced by *Jones* required a finding that the appellant had standing to assert the illegality of the search of the corporate records. *Elbel v. United States*, 364 F. 2d 127, decided four years later, cited *Villano* and *Henzel* with approval

but found that the appellant therein no longer controlled the corporation because it was in the hands of a trustee in bankruptcy and he was a mere "borrower" not a shareholder. *Elbel* strongly implied that if the appellant had been an owner, the result would have been different.

The Federal courts have thus not followed *Lagow* since *Jones*, but instead have applied *Jones* with varying results depending on the facts in each case.

2. In California, evidence that is the product of an illegal search and seizure has been excluded since *People v. Cahan*, 44 Cal. 2d 434, 443 (1955). California courts exclude the evidence not because of any personal wrong against the victim but because exclusion of the evidence is the only way to deter unlawful police conduct. *People v. Martin*, 45 Cal. 2d 755.

The essence of this deterrence rationale is that by removing the basic incentive for illegal searches, *i.e.* the hope they will turn up evidence, the police will refrain from such searches. Unlike the personal incrimination theory which need not require exclusion if the evidence is to be used against another, the deterrence rationale requires exclusion any time the police have acted unlawfully.

The United States Supreme Court in *Linkletter v. Walker*, 381 U.S. 618 (1965) firmly committed itself to this deterrence rationale, noting that admission of the evidence in the past had not suppressed police lawlessness but rather had acted as a license for it (*Linkletter* p. 634). *Linkletter* has since been reaffirmed by *Tehan v. United States, ex rel. Shott*, 382 U.S. 406 (1966) finding deterrence of police mis-

conduct the “single and distinct” purpose of the exclusionary rule.

Lagow and *Jones* were decided before the Supreme Court’s commitment to the deterrence rationale. Prior to *Linkletter*, it had not been clear whether the Supreme Court excluded evidence on the “personal incrimination” or “deterrence” theory. See *Standing to Object*, 24 Univ. of Chi. L.R. 342, 365 (1967). Although a standing case has not been decided by the Supreme Court since *Linkletter*, the Supreme Court’s commitment to the deterrence rationale leaves the standing requirement of *Lagow* (and even *Jones*) without a theoretical or practical foundation. Deterrence cannot be served by admission of illegally obtained evidence against persons without “standing”.

Conclusion.

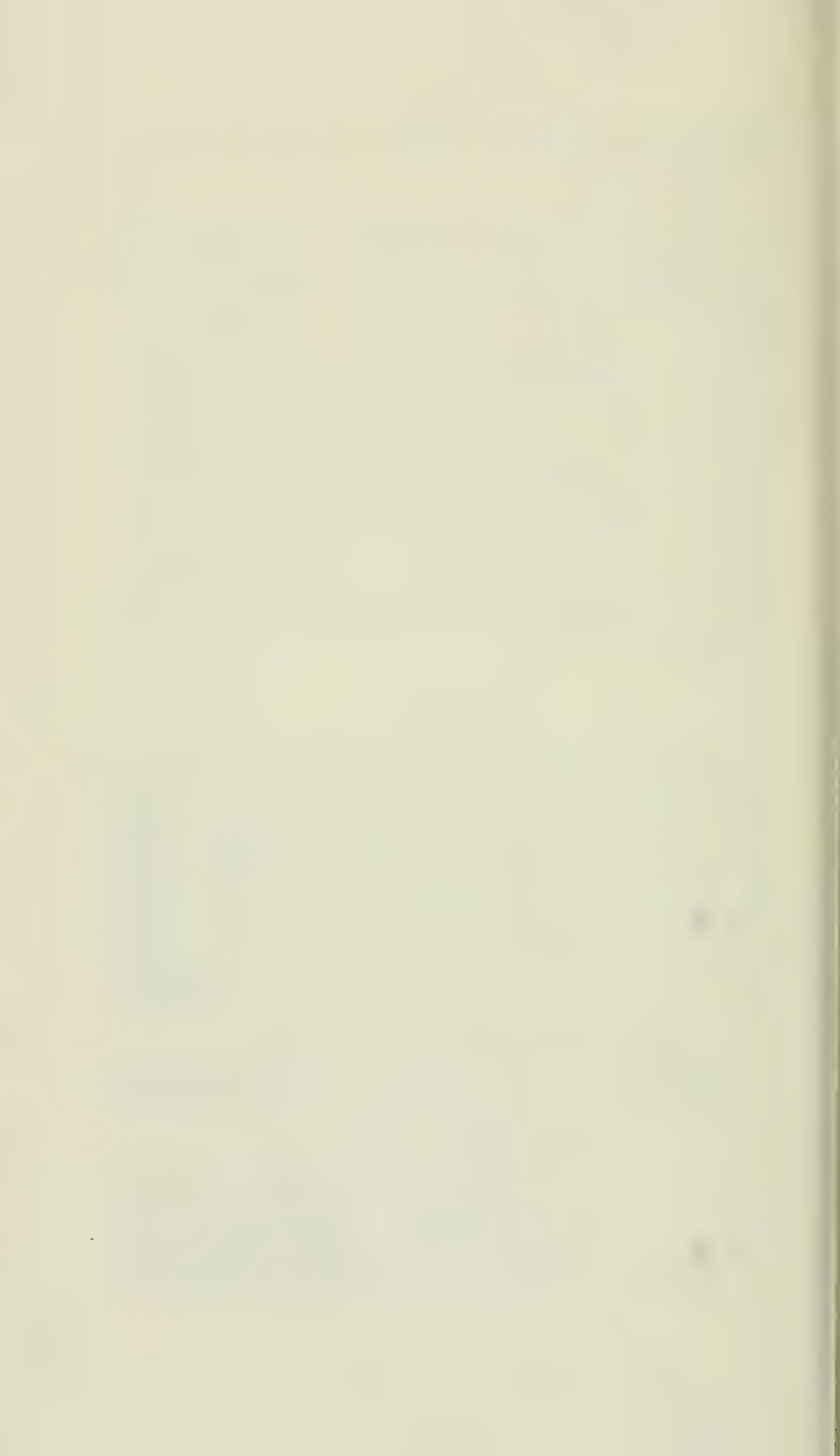
The liberal trend in the Federal courts emanating from *Jones* effectively overruled *Lagow v. United States* (the basis of the decision below). This liberalization of the standing requirement combined with the Supreme Court’s undermining of the foundations of standing by its commitment to the deterrence rationale in *Linkletter* compel exclusion of the corporation’s records in this case and therefore reversal. Rehearing is not sought in respect to any other questions.

Dated at Los Angeles, California this 18 day of May, 1967.

Respectfully submitted,

GORDON & WEINBERG,
MITCHELL S. SHAPIRO,

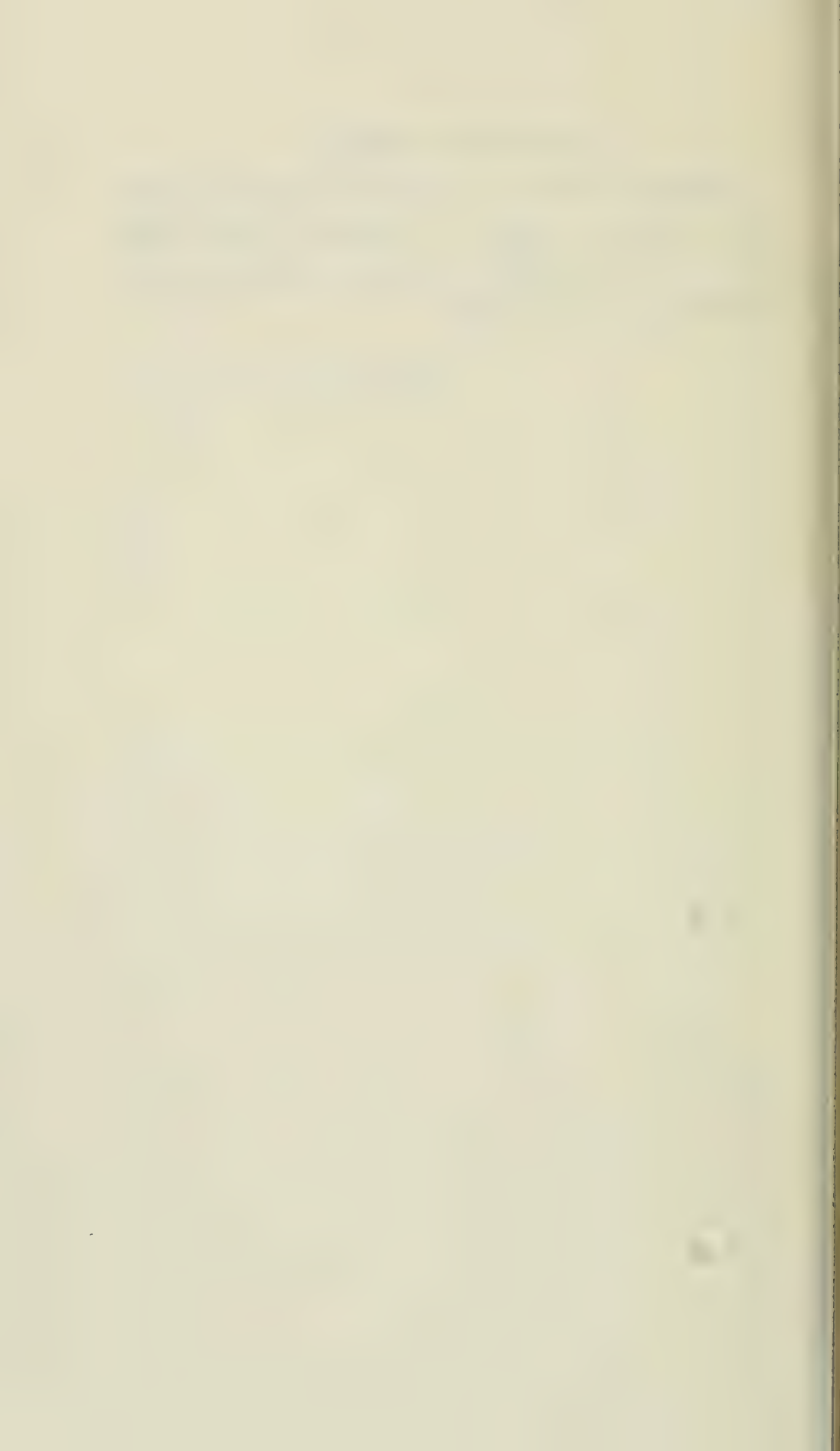
Attorneys for Appellant Petitioner.



Certificate of Counsel.

I, Mitchell S. Shapiro, the attorney for the Appellant certify that this Petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

MITCHELL S. SHAPIRO



United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20943 ✓

BRENT L. SELICK,

Appellant,

vs.

SUN HARBOR MARINA, INC.,
A Nevada Corporation,

Appellee.

On Appeal From the United States District Court
For the Northern District of California
Southern Division

BRIEF FOR APPELLEE

HIGGS, JENNINGS, FLETCHER & MACK
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San Diego, California 92101
and

WRIGHT & TOOTHACRE
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Attorneys for Appellee

FILED

APR 7 1967

PR 7 1967 WM. B. LUCK, CLERK

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TABLE OF AUTHORITIES CITED

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20943

BRENT L. SELICK,

Appellant,

vs.

SUN HARBOR MARINA, INC.,
a Nevada Corporation,

Appellee.

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an appeal from an order of the District Court dismissing appellant's libel for want of jurisdiction on the Admiralty side of the District Court. (Tr., vol. 1, p. 43)

Appellant was the vendor of an ex-Coast Guard picket boat under a conditional contract of sale to one Potter. Potter berthed the vessel at appellee's wharf incurring wharfage fees which were not paid. Appellee, being unsuccessful in its attempts at collection, asserted a possessory lien on the vessel and conducted a public auction of the boat for purposes of foreclosing its lien. (Tr., vol. 1, p. 22)

Appropriate notices of the auction were sent to appellant and the Potters. (Tr., vol. 1, p. 22)

Thereafter appellee brought an in personam action against appellant and the Potters to quiet title to the vessel which appellee had purchased at the auction. Appellant appeared by Answer in the quiet title action and filed a Cross-complaint against appellee herein alleging a conversion of the boat. (Tr., vol. 1, p. 19)

Following trial of the action, in which appellant participated, the San Diego Superior Court signed Findings of Fact and Conclusions of Law (Tr., vol. 1, p. 21) and entered its decree quieting title to the boat in appellee as against appellant and the Potters. (Tr., vol. 1, pp. 24-26)

After entry of the decree quieting title in appellee, appellant brought this action invoking the admiralty jurisdiction of the District Court seeking damages of appellee for reasonable rental of the boat, negligent damage to the vessel and for conversion of the vessel. (Tr., vol. 1, pp. 1-5)

Although it does not appear in this record, appellant has filed an appeal from the quiet title decree entered by the State Court. (See Opening Brief of Appellant, p. 9) Oral arguments on the State Court appeal are now set for April 12, 1967.

Appellee moved for dismissal of the District Court action (Tr., vol. 1, p. 8) and likewise moved for summary judgment. (Tr., vol. 1, p. 16)

The District Court ordered the action dismissed for want of jurisdiction following a hearing on appellee's motions. (Tr., vol. 1, p. 43)

Appellant filed this appeal. (Tr., vol. 1, p. 44) Appellee has heretofore filed its motion to affirm or dismiss this appeal, which motion has been passed for consideration to submission of the cause on its merits.

QUESTION ON APPEAL

The fundamental question on this appeal is whether the State Court had jurisdiction to determine the quiet title action under the "Saving to Suitors Clause" of 28 USCA 1333 which provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. "

If the State Court had jurisdiction, then title has been quited in appellee, as against appellant (subject to the ruling of the State Courts on the appeal from that decree). Appellant's action for rental, property damage and conversion all must fall if he has no ownership interest in the boat. The action herein is thus a collateral attack upon the quiet title decree.

The Federal District Court may not interfere with the action of a State Court acting within that Court's jurisdiction under the "Saving to Suitors Clause". In the case of The Rosa, 53 F. 132 it was so held at page 134, the Court stating:

"By section 9 of the judiciary act of 1789, as well as by subdivision 8 of section 563 of the United States Revised Statutes, the admiralty and maritime jurisdiction conferred upon the district courts expressly 'saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it'.

This provision must be observed in good faith. It seems to me manifestly to forbid any interference by this court with a suit in

the state court, when the whole subject matter and all the rights of both parties, upon the case as stated by the petition, can be perfectly adjudicated and preserved in the ordinary course of a common law suit. "

ARGUMENT

The State Court had concurrent jurisdiction to determine the appellee's in personam quiet title action in aid of foreclosing its possessory lien for wharfage.

The basic fallacy of appellant's position in this appeal is the assumption that the State Court acted in rem to foreclose a maritime lien. It is thus argued that such a proceeding in rem is within the exclusive admiralty jurisdiction.

Here, however, the quiet title action was one in personam to foreclose a common law lien. In the case of Rounds v. Cloverport Foundry and Machine Co., 35 S. Ct. 596, 237 U.S. 303, 59 L. Ed. 966, the court explains the distinction between actions in rem and actions in personam as those terms have significance in maritime cases as follows (35 S. Ct. at pp. 597-598):

"Further, it is urged in support of the judgment that the proceeding was in personam, and not in rem; that the attachment and direction for sale were incidental to the suit against the owners and for the purpose of securing satisfaction of the personal judgment. Accordingly, it is said, the proceeding was within the scope of the 'Common Law Remedy' saved to suitors by the judiciary act. (citations)

As the last point is plainly well taken, it is unnecessary to go further. It is well settled that an action in personam the State Court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing, - in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly'. Actions in personam with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. (citations) And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy in personam. (citations)

.

In the present case, as we have said, the suit was in personam and the attachment was in that suit. It had no other effect than to provide security for the payment of the personal judgment which was recovered, and it was for the purpose of satisfying this judgment that, in the same proceeding and by the terms of the judgment, the vessel was directed to be sold. It

was within the scope of the common law remedy to sell the property of the judgment debtors to pay their debt. We are not able to find any encroachment upon the exclusive jurisdiction listed in the federal court in admiralty." (See also, 1 Benedict on Admiralty (Sixth Ed.), Section 24, pp. 40-41)

That a common law possessory lien for wharfage exists is supported by Adams v. John R. White and Son (R.I. 1918) 103 A. 230 at p. 232. The enforcement of such liens by the state courts has been upheld in California. (United States of Mexico v. Rask, 118 Cal.App. 21, 49; Arques v. National Superior Co., 67 Cal.App.2d 763, 772-773)

CONCLUSION

Appellee submits its motion to dismiss or affirm upon the moving papers on that motion and the authorities there cited.

It is further submitted that appellant has misconceived the state court proceeding as being one in rem as that term is used in determining exclusive admiralty jurisdiction.

Here, the state court proceeded in in personam to enforce a lien within its jurisdiction and quieted title to the vessel here involved in an action brought in personam as against appellant and the Potters, which action did not proceed against the vessel itself directly. The federal courts should not interfere with the state court proceeding. To do so would not only lead to a prolixity of litigation but could lead to inconsistent judicial determinations and attendant confusion and litigation.

Appellant has had his day in the state courts and is still pursuing his remedy therein.

The dismissal of the action should be affirmed.

Respectfully submitted,

HIGGS, JENNINGS, FLETCHER & MACK and
WRIGHT & TOOTHACRE

By: /s/ EDWARD M. WRIGHT

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ EDWARD M. WRIGHT

NO. 23,945

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

□

EDWIN JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

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United States Attorney

CHARLES ELMER COLLETT
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Attorneys for Appellee

FILED

JUN 19 1967

JUN 12 1967

WM. B. LUCK, CLERK

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NO. 20,946

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

0

EDWIN JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

JURISDICTION

The appeal in the above case is from the Order of the District Court of December 27, 1965, which denied the Petition for Naturalization No. 13608 of Edwin Charles Samuel Johnson. The reason for the denial was lack of good moral character.

STATEMENT OF THE FACTS

The appellant was born in England on February 9, 1924. He became a resident and citizen of Canada, and entered the United States as a lawful permanent resident on November 6, 1957. His petition for naturalization was filed March 28, 1963.

Subsequent to the filing of the petition for naturalization, appellant was arrested and charged with violation of §285 of the California Penal Code, incest, a felony. The charged victim of the incestuous act was his daughter. On February 17, 1964, on a plea of guilty, he was convicted of this crime in the Superior Court of the State of California in and for the County of Yolo, at Woodland. On March 16, 1964, appellant was ordered imprisoned in the State Prison of California for the term provided by law (one to fifty years). He was received by the California Department of Corrections March 18, 1964, and at the time of filing his application for naturalization he was serving the sentence. Certified

copies of the indictment, judgment and sentence are included in the transcript of record which was filed and docketed in this Court on May 5, 1966.

On July 7, 1966, Judge Sweigert of the United States District Court for the Northern District of California, on appellant's petition for a writ of habeas corpus, Civil Number 43950, set aside the judgment and sentence for the crime of incest in violation of §285 of the California Penal Code, and ordered the writ of habeas corpus to issue unless the State of California put appellant to its charges again within sixty days from the date of the order.

Within the time specified in the aforesaid order, the State of California proceeded again to trial in the Superior Court of the State of California, in and for the County of Yolo, in Case Number 2883, on appellant's plea of not guilty, before a jury. On February 17, 1967, he was convicted by the jury of the crime

of incest in violation of §285 of the Penal Code of the State of California. Appellant was not adjudged a habitual criminal within the meaning of subdivision "A" or "B" of §644 of the Penal Code. It was therefore ordered, adjudged and decreed that appellant be punished by imprisonment in the State Prison of the State of California for the term approved by law. The Sheriff of the County of Yolo was commanded to deliver appellant into the custody of the Director of Corrections at California Medical Facility at Vacaville, California. An exemplified copy of the indictment and of the abstract of judgment is attached hereto as Appendix I.

Appellant filed a notice of appeal on February 17, 1967 from the said conviction in the Superior Court of the State of California in and for the County of Yolo, No. 2883. The transcript in the case was received by the District Court of Appeals of the Third District of the State of California on March 21; numbered 3 Crim. 4447.

The opening brief was filed on May 23, 1967. The appellant is apparently currently at liberty on bond.

Section 316(a) of the Immigration and Nationality Act of 1952 (8 USC 1427(a)) requires that an alien who applies for naturalization as a citizen of the United States must establish that during the five years preceding the filing of his petition he has been a person of good moral character.

Berenyi v. District Director,
I&NS, 385 US 630 (1967).

CONCLUSION

It is respectfully submitted that on his plea of guilty to the charge in the indictment on the crime of incest, in violation of §285 of the Penal Code of the State of California, and his conviction by a jury on his plea of not guilty of the same crime, appellant has failed to satisfy the requirements of §316(a) of the

Immigration and Nationality Act, to-wit, that he has been and still is a person of good moral character, and that the appeal should be dismissed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Appellee.

DATED: June 8, 1967.

= = = = =

CERTIFICATE

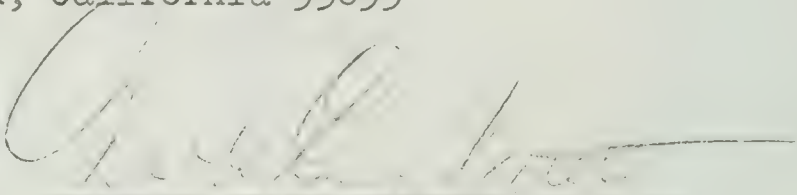
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Appellee's Brief was served upon the Appellant by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to:

Mr. Edwin Johnson
Post Office Box 179
Woodland, California 95695



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Dated: June 8, 1967.

STATE OF CALIFORNIA, } ss.
COUNTY OF YOLO.

I, EDWIN C. S. JOHNSON, County Clerk of the County of Yolo, State of California, and ex-officio Clerk of the Superior Court thereof, the same being a Court of Record having a Clerk and a Seal, and having jurisdiction over Criminal matters do hereby certify that I have compared the foregoing copies with the original INDICTMENT and ABSTRACT OF JUDGMENT re:

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs. EDWIN C. S. JOHNSON, Defendant,
No. 2883

filed in my office on the dates endorsed thereon, and that the same are true and correct copies of the originals, and the whole thereof, as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3rd day of Nov, 1967.

By ROSEMARY G. HURLNEY, Clerk
ROSEMARY G. HURLNEY, Deputy

--ooo--

STATE OF CALIFORNIA, } ss.
COUNTY OF YOLO.

I, ROSEMARY G. HURLNEY, Judge of the Superior Court of the State of California, in and for the County of Yolo, the same being a Court of Record having a Clerk and a Seal, and having jurisdiction over Criminal matters, as such Judge, do hereby certify that EDWIN C. S. JOHNSON is the duly elected, qualified and acting Clerk of said Court, that ROSEMARY G. HURLNEY is the duly appointed, qualified and acting Deputy County Clerk of said County, and that the above Certificate of Attestation is in due form according to the laws of the State of California, and entitled to full faith and credit, and that the signature of said Deputy County Clerk for said Certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of said Court to be affixed this 3rd day of Nov, 1967.

ROSEMARY G. HURLNEY, Judge of the Superior Court

Clerk

ROSEMARY G. HURLNEY, Deputy

--ooo--

STATE OF CALIFORNIA, } ss.
COUNTY OF YOLO.

I, ROSEMARY G. HURLNEY, County Clerk of the County of Yolo, State of California, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the Honorable EDWIN C. JOHNSON who has signed the foregoing Certificate of Attestation, is the duly elected, qualified and acting Judge of said Court, and that the signature of said Judge to said Certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3rd day of Nov, 1967.

Clerk

ROSEMARY G. HURLNEY, Deputy

DEPT. No.

THE UNIVERSITY OF CHICAGO

NAME OF CONTRACTOR.....
 ADDRESS.....
 CITY.....
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ASSAULT ON A POLICE OFFICER
(Commitment to State Prison as provided by Penn. Code Section 223.5)

Das Reich der Südräuber.

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(Judge of Superior Court) A

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Council for Defense

This certifies that on the _____ day of _____, 19____, judgment of conviction on the above-named defendant was entered as follows:

an Case No. Court No. he was convicted by ...; on his plea of
(Court of Jury)

(Cour. or Jury)

(Guilty, not guilty, order conviction or acquittal, once in jeopardy, (count of jury)

not really by reason of "the state" of the state.

rehabilitation of China and of Tibet. It may, however, not have been a threat to the possibility of a settlement of the Sino-Soviet border dispute.

(Reference to Cone of Silence, including Section and Sub-section);

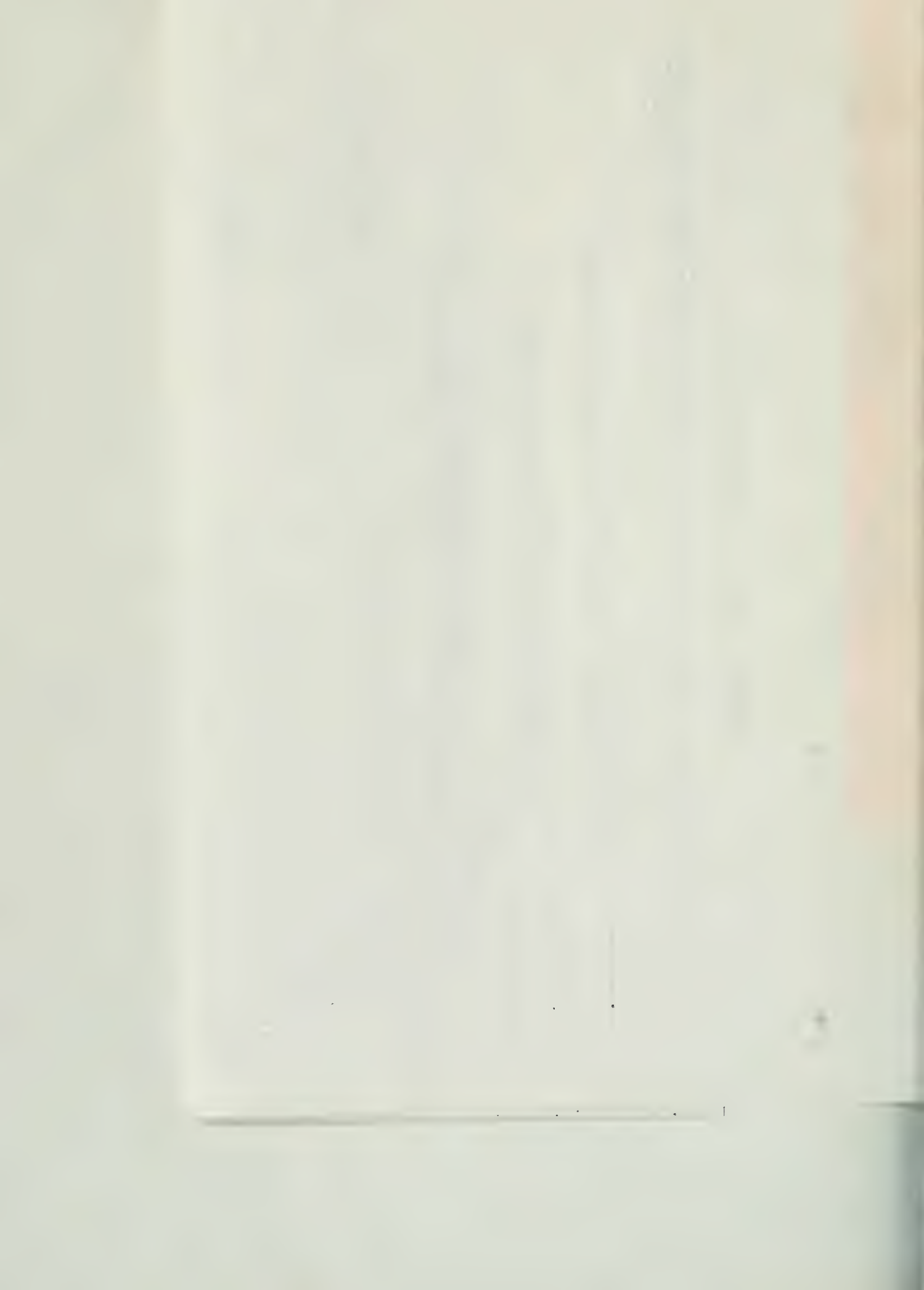
With prior convictions eliminated and proved or admitted as follows:

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Dr. Schmittschke, of the University of the Saarland, is the author of the following in German Code Sections 302e and 302f.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the said defendant be punished by imprisonment in the State Prison of the State of California for the term, not exceeding two years, and that he be committed to the custody of the _____ County of _____, and by _____, warden to the Director or Comptroller of the State of California at the place hereinafter designated,

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and in respect to any other matter, we desire to be as follows:

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal at Washington, D.C., this _____ day of _____, 19____.

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County of San Diego Superior Court of California in and for the County of San Diego

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONRAD ALLEN,

Appellant,

vs.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FILED

JUN 30 1966

WM. B. LUCK, CLERK

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FOR THE NINTH CIRCUIT

CONRAD ALLEN,

Appellant,

vs.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION,

Appellee. 1/

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Southern District of California denying appellant's motion for discharge from custody under Title 28, United States Code, Section 2255.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. This Court has jurisdiction under Title 28, United States Code, Sections 1291, 1294, and 2255.

1/ This case has also been referred to as "Conrad Allen v. R. W. Meier, et al." (Clerk's Transcript of Record).

STATEMENT OF THE CASE

Appellant was charged with failure to register upon entering the United States at San Diego (San Ysidro), California, being a citizen of the United States who had a prior narcotics conviction and being addicted to, and a user of, narcotic drugs. The Indictment was brought under Title 18, United States Code, Section 1407 [Supp. T. R.]. 2/

Appellant entered a plea of guilty on October 15, 1965 [T. R. 13]. He was sentenced to three years in prison with eligibility for parole at any time [T. R. 13].

On January 13, 1966, appellant filed a motion pursuant to Section 2255 of Title 28, United States Code. The motion was based upon the theory that the trial court lacked jurisdiction because the registration requirement of Section 1407 allegedly violated the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States [T. R. 1-8].

The motion was denied without a hearing on January 13, 1966 [T. R. 13-14]. Appellant subsequently filed notice of appeal [T. R. 17].

2/ "T. R. " refers to the Transcript of Record.

III

ERROR SPECIFIED

Appellant has specified only one point on appeal:

1. Alleged unconstitutionality of Title 18, United States Code, Section 1407, because it involves a violation of the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States.

IV

STATEMENT OF THE FACTS

On October 15, 1965, appellant entered a plea of guilty to a charge of failure to register upon entering the United States, being a United States citizen who had a prior conviction as defined in Title 18, United States Code, Section 1407, and being a narcotics addict and user [T. R. 13]. After being sentenced, appellant filed a motion for discharge from custody under Title 28, United States Code, Section 2255 [T. R. 1-8]. The motion was denied without a hearing on January 13, 1966 [T. R. 13-14].

ARGUMENT

- A. TITLE 18, UNITED STATES CODE,
SECTION 1407, DOES NOT VIOLATE
THE SELF-INCRIMINATION PRIVILEGE
OF THE FIFTH AMENDMENT.
-

Appellant contends that the registration requirement of Title 18, United States Code, Section 1407, violates the privilege against self-incrimination. ^{3/} However, the courts have held that the statute does not violate the self-incrimination privilege.

Reyes v. United States, 258 F.2d 774, 778-782
(9th Cir. 1958);

Palma v. United States, 261 F.2d 93, 95
(5th Cir. 1958);

United States v. Eramdjian, 155 F.Supp. 914,
925-929 (S.D. Cal. 1957).

In requesting this Court to strike down a statute passed by the elected representatives of the people, appellant carries a heavy burden. There is a "strong presumption of constitutionality due to an Act of Congress. . . ." (emphasis added).

United States v. Di Re, 332 U.S. 581, 585 (1948).

^{3/} Similar contentions have been made in other cases in this Court, which cases are pending at the time of the preparation of this brief:

Sharon Jeanne Weissman v. United States, No. 19974;
Jimmie Merl Mason v. United States, No. 20233;
Willie Ray Spain v. United States, No. 20888.



Professor Bernard Schwartz wrote in 1957 in regard to the Supreme Court:

"In the twenty years since 1937, the Court has declared invalid only three federal statutes, and not one of these three laws was a legislative measure of great significance."

"The Supreme Court", Professor Bernard Schwartz,
The Ronald Press Company, New York,
1957, p. 26.

Appellant's primary contention is that a person required to register under Title 18, United States Code, Section 1407, would tend to incriminate himself in connection with the California Health and Safety Code. Appellant apparently is referring to California Penal Code Sections 6500 and 6521, since he refers to a commitment to a period not exceeding seven years in cases of narcotics addicts or potential addicts.

However, these statutes do not involve a criminal offense, so there can be no self-incrimination. This is quite clear from the holding in Robinson v. California, 370 U.S. 660 (1962), in which the Supreme Court held that it was a cruel and unusual punishment to subject a narcotics addict to a criminal conviction merely because he was addicted, because this would amount to punishing one for becoming ill. In the same opinion the Supreme Court noted (at pp. 664-665) that a state might properly confine narcotic addicts for treatment and impose penal sanctions for failure to comply with the procedures. If these procedures, which are quite similar in nature to the California provisions, involved

criminal punishment, as appellant contends, then the Supreme Court would have considered them to be unconstitutional as cruel and unusual punishment for being ill. However, the Court's reference to state statutes demonstrates the Court's opinion that these statutes are civil in nature.

The Supreme Court of California has held that there can be no self-incrimination in connection with Penal Code Section 6500, as that section relates to civil commitment, not to criminal prosecution.

In Re De La O, 59 Cal. 2d 128 (1963),

cert. denied, 374 U.S. 856 (1963);

1 San Diego Law Review 68-69.

Thus it is clear that Section 1407 does not involve self-incrimination under the California narcotics commitment statutes. In regard to California criminal statutes, it suffices to say that one registering as an addict or user of narcotics does not admit the commission of any crime. He does not admit an act of any kind. He merely states that he has the status of an addict or user. Furthermore, there is no evidence of venue. Such evidence is essential in a California criminal prosecution.

People v. Megladdery, 40 Cal. App. 2d 748,

762-764 (1940);

People v. Parks, 44 Cal. 105 (1872).

Appellant places great reliance upon the decision in Albertson v. Subversive Act. Cont. Bd., 382 U.S. 70 (1965), involving the statutes requiring Communist Party members to

register if the Party itself fails to do so. The Supreme Court ruled that the registration statute violated the self-incrimination privilege.

However, Albertson involved an exceptional situation. While a Section 1407 registrant admits the commission of no crime within the United States, every registrant under the statutes concerned in Albertson "practically confesses his violation of the Smith Act." 4/

The Communist Party was declared to be an "outlaw" in Title 50, United States Code, Section 841. Since legislation has virtually made the Communist Party "a criminal conspiracy per se" and since the Supreme Court has held that "mere association with the Communist Party" presents sufficient threat of prosecution to support a self-incrimination claim, 5/ an admission of membership, which would be required of all registrants, obviously would violate the privilege.

Albertson should not be regarded as establishing a radical alteration in existing law. In analogous circumstances this Court had declared unconstitutional a statute requiring self-incrimination by every registrant.

Russell v. United States, 306 F.2d 402 (9th Cir. 1962) (involving firearms registration).

Under Section 1407, there is no aspect of "automatic" self-

4/ 18 University of Chicago Law Review 687, 726 (1951).

5/ Communist Party of United States v. United States, 331 F.2d 807, 812 (C.A.D.C. 1963), citing Supreme Court decisions.



incrimination by every registrant, even if it be assumed arguendo that some registrants would incriminate themselves. Consequently, it is not reasonable to assume that Albertson has silently overruled Reyes, Palma, and Eramdjian, supra.

A second feature which distinguishes Albertson from the instant case is the fact that the instant case involves a claim that the validity of a Federal statute must depend upon the existence or non-existence of certain state statutes (i. e. , self-incrimination exists because the state statutes exist). The most recent Supreme Court decision involving the problem of interference and conflict between Federal and state legislation is Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). In Murphy witnesses contended that their involuntary answers in a state proceeding might tend to incriminate them under Federal law. Rather than eliminate the answers, as appellant urges this Court to do in an analogous proceeding, the Supreme Court ruled (at p. 79) that the answers would be required and that the compelled testimony and its fruits could not be used against the witnesses in subsequent Federal criminal prosecutions. If it be assumed arguendo that Section 1407 is self-incriminatory, the better solution is to protect the registrant in subsequent criminal prosecutions rather than to throw out the baby with the bath water while creating serious problems in connection with Federal interference with state statutes and state interference with Federal statutes. No immunity statute is required in order to protect a person from use of self-incriminating testimony against him.



Adams v. Maryland, 347 U.S. 179, 181 (1954).

A third distinction between Albertson and the Section 1407 issue is the fact that a tribunal was available to rule upon the self-incrimination claim in Albertson. The opinion in that case distinguishes United States v. Sullivan, 274 U.S. 259 (1927), upon this ground, among others (at p. 79). Sullivan, a unanimous decision, held that one claiming that an income tax return called for self-incriminatory answers should raise the objection in the return but could not refuse to make any return at all (at p. 263). By analogy, it would seem self-evident that a potential Section 1407 registrant must raise his objection when registering (which appellant failed to do), unless (1) Sullivan has been overruled (it has not) or (2) the statute falls within the classification of those provisions requiring "automatic" self-incrimination by all registrants, as in Albertson and Russell, supra. It is clear that Section 1407 does not carry the latter stigma.

Appellant also notes that a registrant would be subject to prosecution for making a false statement while registering under Section 1407. However, the Constitution affords no protection against the giving of a false answer in reply to official questions.

Smiley v. United States, 181 F.2d 505, 507

(9th Cir. 1950), cert. denied,

340 U.S. 817 (1950).

B. APPELLANT MAY NOT RAISE A
SELF-INCRIMINATION CLAIM IN
SECTION 2255 PROCEEDINGS.

Appellant entered a guilty plea in the trial court and subsequently filed a motion under Title 28, United States Code, Section 2255 [T.R. 1-8, 13].

This Court has held that a plea of guilty "waives all defenses other than that the indictment charged no offense under the laws of the United States. . . . "

Forthoffer v. Swope, 103 F.2d 707, 708
(9th Cir. 1939).

It has been held that a voluntary and knowing plea of guilty constitutes a waiver of all nonjurisdictional defenses.

Thomas v. United States, 290 F.2d 696, 697
(9th Cir. 1961).

This rule has been applied where self-incrimination was claimed after a guilty plea was entered.

Harris v. United States, 338 F.2d 75, 80
(9th Cir. 1964).

However, appellant asserts that the trial Court lacked jurisdiction, apparently upon the theory that Section 1407 is unconstitutionally self-incriminatory. A glance at the statute is sufficient to refute this contention. Section 1407 requires registration by any international traveler who is a citizen of the United States and falls within one of the following classifications:

1. One who is addicted to narcotic drugs.

2. One who uses narcotic drugs.
3. One who has been previously convicted of certain violations.

Appellant was charged under all three classifications. The latter provision cannot be self-incriminatory. Once a person has been convicted of a crime, he cannot claim the Fifth Amendment privilege in regard to questions concerning that crime.

United States v. Romero, 249 F.2d 371, 375
(2nd Cir. 1957).

Assuming, without conceding, that the addict and user provisions of Section 1407 are unconstitutionally self-incriminatory, the reference to registration by a prior convicted violator, contained in the same statute and in the indictment, would not be affected by the superfluous references to addicts and users.

A court may disregard surplusage in an indictment.

Ford v. United States, 273 U.S. 593, 602 (1927);
Soper v. United States, 220 F.2d 158, 161
(9th Cir. 1955).

Consequently, it cannot be said that the trial court lacked jurisdiction, in view of the allegation of failure to register as a prior convicted violator, so the rule set forth in Forthoffer, Thomas, and Harris, supra, should be sufficient to prevent appellant from raising a Section 2255 issue of this nature after entering a guilty plea.

Furthermore, a judgment of a Court of the United States is entitled to a presumption of regularity.

Thus, if it be assumed arguendo that the addict and user provisions of Section 1407 are unconstitutional, it may be presumed that the guilty plea was entered under the unquestioned prior convicted violator provision. In fact, this was the understanding of the trial court [T.R. 13-14].

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO

N O. 2 0 9 4 9 ✓

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N O. 2 0 9 4 9
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIS A. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Willis A. Smith, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on January 26, 1966 [C. T. 2]. ^{1/} The indictment was brought under 21 U. S. C. §174, and charged that the appellant unlawfully concealed and sold 22.985 grams of heroin which had been imported into the United States of American contrary to law.

Appellant pleaded not guilty and the case proceeded to trial

^{1/} C. T. refers to Clerk's Transcript of Record.



before the Honorable Irving Hill. On February 25, 1966, appellant was found guilty on both counts of the indictment by the jury [C. T. 44].

On March 25, 1966, appellant was sentenced to serve a period of twelve years.

Appellant's Notice of Appeal was timely filed [C. T. 56].

The jurisdiction of the District Court was based on Title 21, United States Code, §174, and Title 18, United States Code, §3231, and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, §§ 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 21, United States Code, §174, provides as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to

commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTIONS PRESENTED

- A. Did the Trial Court Err in Not Compelling the Government to Disclose the Name of the Informant Prior to the Time the Government Did in Fact Present Appellant with the Informant's Name?
- B. Did the Court Err in Not Granting Appellant's Counsel a Greater Amount of Time in Which to Interview the Informant?
- C. Was the Court's Alibi Instruction Within the Discretion Granted to a District Judge?
- D. Was Appellant Denied His Right to the Assistance of Effective Counsel?



IV

STATEMENT OF FACTS

On September 2, 1965, at approximately 1:30 P.M., a meeting was held in the office of the Federal Bureau of Narcotics in Los Angeles [R. T. 60]. ^{2/} Present at the meeting, among others, were Agent Chris V. Saiz and an informant, Richard Abelar. At approximately 2:30 P.M., Agent Saiz and the informant left the office and drove to the informant's residence in Culver City [R. T. 62]. Upon arrival at the informant's residence a phone call was made to 398-1971, the phone number of the appellant, Willis A. Smith [R. T. 62]. A meeting was arranged whereby the informant could purchase heroin from the appellant.

Thereafter Agent Saiz, accompanied by the informant Abelar, drove to the parking lot of the Thriftmart Market located on Centinela Boulevard [R. T. 63], arriving at approximately 4:05 P.M. [R. T. 64]. Upon arrival in the parking lot Agent Saiz searched the informant for any narcotics or money with a negative result. Saiz then gave the informant a white envelope containing \$850.00 [R. T. 64].

Shortly thereafter appellant arrived driving a red 1955 or 1956 Jaguar and parked two parking spaces away from the vehicle Saiz and the informant were parked in [R. T. 65]. Prior to his arrival in the Thriftmart Market appellant had been seen leaving his residence at 3736 Inglewood Boulevard by Agent Restow. Agent

^{2/} R. T. refers to Reporter's Transcript of the trial.



Restow initially observed appellant through high-powered binoculars and then followed him to the parking lot of the Thriftmart Market.

After appellant's arrival in the parking lot the informant Abelar exited his vehicle and walked over to appellant's car. Abelar proceeded to hand appellant the envelope containing \$850.00 and received in return approximately one ounce of heroin [R. T. 65, 66].

After the transaction had been completed appellant drove out of the parking lot and passed within ten feet of Agent Westrate who had been conducting a foot surveillance [R. T. 94, 95]. Agent Westrate then entered a Government vehicle and followed appellant back to his place of residence at 3736 Inglewood Boulevard [R. T. 96, 97].

ARGUMENT

I

THERE WAS NO ERROR IN THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A BILL OF PARTICULARS IN THAT THE NAME OF THE INFORMANT WAS DISCLOSED TWO DAYS PRIOR TO TRIAL.

Appellant argues that the trial court committed error in denying his motion for a bill of particulars and refusing to compel the Government to disclose the name of the informant Abelar prior to trial. The facts surrounding the disclosure of the informant's identity indicate clearly that appellant was advised of the informant's



identity some two and one-half days prior to trial and thus the appellant was in no way disadvantaged by the initial denial of the motion for a bill of particulars.

On Wednesday, February 16, 1966, appellant was supplied with the date, time and place of the transaction alleged in the two-count indictment [R. T. 28, Vol. A]. At the same time the Government agreed to furnish appellant with the name of the informant and to have him available at the time of trial [R. T. 31, Vol. A]. The Government did, however, refuse to disclose the name of the informant at that time.

On the following Monday, February 21, 1966, two and one-half days prior to trial, appellant was given the name of the informant [R. T. 50]. Appellant was also notified that the informant was in custody and that he would be available for interviewing [R. T. 49]. This was two and one-half days prior to the commencement of the trial. During this period counsel for appellant had ample "opportunity" to examine Richard Abelar with respect to any matters pertinent to the preparation of an adequate defense. However, appellant's trial counsel indicated that informant Abelar was not "ready" to discuss his position in detail with appellant's counsel on the occasions when appellant's counsel visited him in jail prior to the commencement of trial [see appellant's brief, p. vii].

Appellants rely on the leading case of Roviaro v. United States, 353 U.S. 53 (1957), in support of their contention that the name of the informant should have been supplied in response to the



request of the bill of particulars. However, appellee contends that neither the holding of Roviaro nor the principles underlying that decision necessarily require the pre-trial disclosure of an informant's identity in the instant case.

The Roviaro holding respecting the disclosure of the identity of a Government informant is not a rule which was meant to be binding on trial courts regardless of the circumstances of a given case. As was stated by the court in the Roviaro decision:

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Roviaro v. United States, supra, at p. 62.

Thus it is apparent that the fundamental principles of fairness to the accused respecting his right to adequately prepare his defense must be examined on a case-by-case basis. The decision as to whether to disclose the informant's name and if so, at what time, must be judged in light of fairness to the accused and all of the special considerations attendant a given case.



In Roviaro the informer was the only witness in a position to amplify or contradict the testimony of the Government witnesses. Roviaro v. United States, supra, at p. 64. Clearly a pre-trial disclosure of the informant's identity was crucial in those circumstances; it could have provided the name of a man who would possibly have been the "sole" witness for the defense. In the case at bar, however, defense counsel had numerous alibi witnesses who were in a position to amplify or contradict the testimony of the Government witnesses. These witnesses would and did in fact testify that the appellant was at a party in their presence at the time of the alleged sale of heroin. Thus appellant was not faced with the same difficulty as was Roviaro whose sole potential witness could neither be identified or located.

Appellant relies on footnote 15 in the Roviaro case as authority requiring the trial court to compel the Government to disclose the identity of the informant upon the filing of the motion for a bill of particulars. Footnote 15 was not argued by counsel in Roviaro and was not necessary to the holding. Furthermore, although it did indicate the Court's position as to that issue under the particular circumstances of Roviaro it must be read in light of the clearly enunciated rationale that the issue as to disclosure of an informant's identity must be subjected to a case-by-case scrutiny by trial courts. As was stated by the Supreme Court as recently as March of 1967:

"What Roviaro thus makes clear is that this Court was unwilling to impose any absolute rule

requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials." McCray v. Illinois, 18 L. Ed. 2d 62, 70 (1967). See also Jenks v. United States, 353 U.S. 657 (1957).

An examination of the record in the case at bar indicates that even if it was error to fail to disclose the name of the informer mentioned in Count Two of the indictment at the time of the filing of the motion for a bill of particulars, this error, if such it was, was cured by the Government's disclosure of the name of the informant on the following Monday, two and one-half days prior to the commencement of trial and but four days after the motion had been denied. Since the fact sought to be elicited was disclosed so soon after the denial the error was a harmless one. Sorrentino v. United States, 163 F.2d 627 (9 Cir. 1947).

Finally, it must be noted that not only was appellant advised of the identity of the informant Abelar two and one-half days prior to trial, but the informant subsequently took the stand during the trial and testified, perjurally as the jury found, that the appellant was not the man from whom he had purchased the heroin as charged in the indictment [R. T. 136]. Thus appellant had the full advantage of the informant Abelar's testimony for whatever it was worth and should not now be heard to complain that he was prejudiced by not having the informant's name four days earlier. This is especially true, since appellant's brief clearly indicates that as late as two

days prior to trial Abelar "would only remark that he was undecided whether to testify for the Government or to keep silent" (Appellant's brief, p. vii).

II

APPELLANT WAS GRANTED ALL THE TIME WHICH HE REQUESTED TO DISCUSS THE INFORMER'S TESTIMONY

Appellant contends that he was unduly prejudiced by the amount of time he was given in which to interview the informant after he received word that the informer wished to testify for the defense. Appellant's trial counsel had, of course, interviewed the informant in jail prior to trial at which time the informant apparently was undecided as to whether he would remain silent or testify for the Government.

The record nowhere indicates that appellant's trial counsel was in any way curtailed in the amount of time he needed to interview the informant. After trial counsel was made aware that the informant was desirous of testifying for the defense the record discloses the following:

"MR. GRAY: Yes, Your Honor, I do. I would like just a moment or so to go to the fifth floor and to talk to the informant. He has been in custody, and I haven't had an opportunity to talk with him. This morning he was in the hallway when he was down here, when he was first brought here, and he stated he would

like to talk to me. And I would like to talk to him."

* * * * *

"THE COURT: How long will you need to talk with this gentleman?

"MR. GRAY: Just a very short period, Your Honor." [R. T. 127].

* * * * *

"THE COURT: Call your next witness.

"MR. GRAY: My next witness is not here yet.

"THE MARSHAL: I believe he is out in the hall.

"THE COURT: Do you need a brief recess?

"MR. GRAY: Yes.

"THE COURT: How long?

"MR. GRAY: Five minutes." [R. T. 133].

After the five minute recess, appellant's trial counsel proceeded to call the informant to the stand [R. T. 134]. In no way did he indicate that he needed any more time in which to interview the informant. Indeed the record is clear that appellant's trial counsel requested but a five minute recess and Judge Hill complied with that request. Trial counsel's unarticulated desire for more time was never communicated to the trial court and surely cannot be considered by this Court in any way.

Finally, it is clear that appellant received the full benefit of the informant's testimony, such as it was, when the informant



testified that appellant was not the man from whom he had purchased the heroin charged in the indictment [R. T. 136].

III

THE COURT'S SPECIAL INSTRUCTION ON ALIBI WITNESSES WAS PROPER.

In his charge to the jury Judge Hill gave the following special instruction on alibi witnesses:

"In this case there is a direct factual contradiction in the testimony of two groups of witnesses on this question of alibi. The defendant has offered evidence of an alibi and his eye witnesses, if believed, state that he did not leave his house until 5:30 P. M. on the day in question. The government has offered testimony of eye witnesses which, if believed, indicates that the defendant left his house earlier that afternoon and proceeded to the Thrift Mart parking lot. You have to resolve that conflict. In so doing, ladies and gentlemen, bear in mind and carefully scrutinize the character of the witnesses on both sides, their positions during the periods involved, their experience, if any, in observation, and all of the other factors which I have mentioned to you before which you must consider in weighing a witness's testimony.

"Among other factors, you may bear in mind the testimony of one witness that there were sixteen people in this house during at least some of the period in question and the difficulty of anyone observing and keeping track of the movements and actions of that many persons at all times." [R. T. 222, 223].

Judge Hill's special instruction on alibi witnesses was not prejudicial and was within his power to comment on the evidence. "That trial judges of the United States Courts have authority to comment on the evidence in their instructions is so well established as to require no citation of authority." Jones v. United States, 361 F.2d 537, 540 (D. C. C. A. 1966); Shaw v. United States, 244 F.2d 930 (9 Cir. 1957). Judges of a Federal Court are not only permitted to instruct the jury on the facts, but also to comment on the credibility of witnesses. Bernal-Zazueta v. United States, 225 F.2d 60, 62 (9 Cir. 1955); Kravitz v. United States, 281 F.2d 581 (3 Cir. 1960), cert. denied 364 U.S. 941. A judge is free not only to give his impressions of the witnesses but to point out the rational implications of the evidence. United States v. Frankel, 65 F.2d 285 (2 Cir. 1933).

Considerable latitude is permitted to a judge with respect to instructions and comment on the evidence. "The trial judge may always comment in his charge to the jury concerning facts on matters of common knowledge or facts of which judicial notice may be taken, where the comment is applicable to the subject

matter before it." Lake v. United States, 302 F.2d 452 (8 Cir. 1962). In the case at bar, Judge Hill's remark concerning the difficulty of observing an individual's activity at a party was such a comment. The judge's comment here reflects an awareness of the proper role he is to play, "that a federal judge in a criminal case is more than a mere moderator, he may assist the jury in arriving at a just conclusion by explaining and commenting on the evidence, and by expressing his opinion upon the facts. . . . A judge may analyze and dissect the evidence so long as he does not distort it or add to it!" Querua v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L.Ed. 1321 (1933). Clearly the court's alibi instruction was within the discretion granted to a district judge.

IV

APPELLANT WAS PROVIDED WITH THE
ASSISTANCE OF CAPABLE AND VIGOROUS
COUNSEL WHO FULLY PROTECTED APPEL-
LANT'S RIGHTS.

Appellant sets forth two alleged errors committed by counsel during the trial as the basis for his claim that he was denied his constitutional right to the assistance of effective counsel.

The basic test in this circuit regarding the adequacy of counsel is set forth in Bouchard v. United States, 344 F.2d 872, 874 (9 Cir. 1965). To show that trial counsel was incompetent an appellant must show that counsel was so "incompetent or

inefficient to make the trial a farce or mockery of justice".

Due process certainly does not require "errorless counsel and not counsel judged ineffective by hindsight, but rather counsel reasonably likely to render and rendering reasonably effective assistance". Brubaker v. Dickson, 310 F.2d 30, 37 (9 Cir. 1962).

Appellant sets forth as trial counsel's first error the fact that he failed to challenge several jurors at the request of appellant. The record nowhere indicates that appellant personally urged his trial counsel to strike the veniremen complained of. Even assuming, arguendo, that appellant did request his trial counsel to excuse the three veniremen it is settled that an indigent accused has; --

" . . . a right to be cautioned, advised and served by counsel so that he will not be the victim of his poverty. But he has no right to continuous service, nor to counsel of his choice, nor to dictate the procedural course of his representation." Rogers v. United States, 325 F.2d 485 (10 Cir. 1963).

Appellant also contends that trial counsel committed error in failing to move to dismiss after the informant testified on behalf of the defense "on the grounds that the Court could not determine that sufficient evidence existed to permit the jury to find defendant guilty beyond a reasonable doubt".

Appellant fails to grasp the true function of a motion to dismiss. Under Rule 12(b) of the Federal Rules of Criminal

Procedure a motion to dismiss will lie prior to trial based upon defects in the accusation or in the institution of the prosecution. Any motion directed to the sufficiency of the evidence would have to be made pursuant to Rule 29, Federal Rules of Criminal Procedure, and should be made appropriately either at the conclusion of the Government's case or at the conclusion of all of the evidence. This is the proper vehicle with which to challenge the sufficiency of the evidence.

Trial counsel properly failed to move to dismiss after the informant had testified because no such motion is cognizable in the Federal Courts. The import of the informant's testimony was to present a question of credibility and a question of fact which properly were sent to the jury for their determination.

Finally, appellant claims that trial counsel erred in giving late notice of a motion for bail pending appeal. This motion was made after the verdict of the jury had been returned and is in no way relevant to trial counsel's efficiency and ability at trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKE ROSADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKE ROSADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT
OF THE CASE

Appellant was indicted by a Federal Grand Jury on September 15, 1965, in a four-count Indictment, for violation of Title 21, United States Code, Section 174 [C. T. 2]. ^{1/} Counts One and Three charged appellant with possession of 4.400 and 9.260 grams of heroin respectively. Counts Two and Four charged appellant with sale of said quantities of heroin.

On November 9, 1965, following trial by the Court, the

^{1/} C. T. - Clerk's Transcript of Record.

Honorable E. Avery Crary found the appellant guilty on all four counts [C. T. 8].

On December 7, 1965, appellant was sentenced to five years' imprisonment on each count, sentence to run concurrently [C. T. 9].

On December 10, 1965, appellant filed a timely notice of appeal [C. T. 12].

Jurisdiction of the District Court rested on Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. This Court has jurisdiction under Title 28, United States Code, Section 1291 and Section 1294.

II

STATUTE INVOLVED

The Indictment in this case was brought under Title 21, United States Code, Section 174, which in pertinent part states as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000."

III

STATEMENT OF THE FACTS

Michael W. Riely, a Government informant, testified that a couple of weeks prior to March 7, 1965 he met the appellant on Brooklyn Avenue in Los Angeles and the appellant offered to sell him some narcotics [R. T. 57]. 2/ On March 7, 1965, he (Riely) met with Federal Narcotic Agent Harry J. Watson at about 11:00 A. M. [R. T. 21]. He telephoned the appellant and asked about narcotics. He was told to call back in a little while and when he did so, was informed that the narcotics were available [R. T. 22]. Agent Watson then searched Riely and gave him \$60 [R. T. 22]. Riely then proceeded to the home of the appellant and met appellant in front of his home. Riely stayed outside, appellant went into his house to make a telephone call. When appellant re-emerged, Riely gave him the \$60 [R. T. 22]. Appellant then left the area and returned in about 10 minutes and after again going into his house and re-emerging, he gave Riely 4.400 grams of heroin. Agent

2/ R. T. - Reporter's Transcript of Record.

Watson meanwhile had kept Riely under constant uninterrupted surveillance [R. T. 62-64]. Watson in corroboration testified that he had searched Riely, found no narcotics in his possession prior to the sale spelled out above, and then Reily delivered the 4.400 grams of heroin to Watson [R. T. 64].

Appellant had stipulated that Herman J. Meuron was a qualified (expert) forensic chemist [R. T. 5]. Meuron testified that the substance delivered to Watson was heroin [R. T. 7-10]. Meuron also testified that the powdery substance representing the second buy on March 9, 1965 was heroin [R. T. 12-13].

On March 9, 1965 Riely again met Watson, then called appellant, and arrangements were made to make a second purchase [R. T. 25, 66]. Watson placed a radio transmitter on the person of Riely. Watson again searched Riely with negative results and gave him \$120. They then drove to Evergreen and Winter Streets where Riely exited the vehicle and walked toward the home of appellant [R. T. 25-66]. Except for a brief space of 4 or 5 minutes, Watson kept Riely under constant visual surveillance. During those 4 or 5 minutes, Watson overheard a conversation relating to this second sale.

Watson heard a male voice ask Riely if he (Riely) wanted to buy a half ounce, Riely said yes, then Watson heard a telephone dialed two or three times and a few minutes later heard a telephone ring and a male voice say "five minutes", Riely was then told to wait outside [R. T. 26, 66-7]. Riely who had been in appellant's home for 4 or 5 minutes then emerged and remained in front of the

house [R. T. 67]. Appellant then emerged, left the area for several minutes, returned, and then in the yard in front of the house gave Riely 9.26 grams of heroin [R. T. 26-7, 67-8]. This heroin was then immediately given to Watson [R. T. 27, 67].

Appellant took the stand in his own defense and denied that he had sold heroin to Riely [R. T. 99, 100, 104]. He did not deny the receipt of the monies [R. T. 102, 104]. He did not deny meeting with Riely at the times and places Riely had testified to [R. T. 101, 104]. Appellant testified however that the sales consummated on March 7 and March 9 were of benzedrine pills [R. T. 102-105].

IV

SUMMARY OF ARGUMENT

A. Appellant has waived his right to attack the verdict on the basis of insufficiency of evidence.

B. Evidence whether circumstantial or direct must be, on appeal, viewed in the light most favorable to the Government.

C. The cross-examination of Government's witness was not improperly limited.

ARGUMENT

A. APPELLANT HAS WAIVED HIS RIGHT
TO ATTACK THE SUFFICIENCY OF
THE EVIDENCE.

A close examination of the record reveals that the appellant at no time moved for a judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. No such motion was made at the close of the Government's case [R. T. 95] nor at the end of the entire case [R. T. 114, 118].

As stated by this Court in Hardwick v. United States, 296 F.2d 24 (1961) at pages 25-26:

"Thus, no motion was made by either defendants for an acquittal upon the ground of insufficiency of the evidence, at any time in the case. Under these circumstances the point has been waived. Ege v. United States, 9 Cir. 1957, 242 F.2d 879, 883; Joseph v. United States, 9 Cir. 1944, 145 F.2d 73, cert. denied 323 U.S. 776, 65 S.Ct. 188, 89 L.Ed. 620." [Emphasis added]

Accordingly, the attack by appellant upon the sufficiency of the evidence must fall.

See also:

Foster v. United States, 318 F.2d 684, at 686

(9 Cir. 1963);

Rule 29, Federal Rules of Criminal Procedure.

B. THE EVIDENCE CLEARLY WAS INSUFFICIENT TO SUSTAIN THE VERDICT.

Conceding, only arguendo, that the appellant did not waive, his objection as to insufficiency attacks the sufficiency of the evidence by asserting that circumstantial evidence must preclude every hypothesis but guilt. It would appear that appellant fails to distinguish between (1) what is circumstantial evidence, (2) what is the probative effect of circumstantial evidence, and (3) the responsibility and obligation of the trier of fact in evaluating same.

Preliminary, circumstantial evidence is clearly defined in instruction #8.02, Mathes and Devitt Federal Jury Practice and Instructions, as follows:

"There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence -- such as the testimony of an eye-witness. The other is circumstantial evidence -- the proof of a chain of circumstances pointing to the commission of the offense." (citations omitted)

The Government contends that the testimony in this case is direct. However, assuming arguendo that it was circumstantial, its impact is the same, and the verdict must be affirmed.

The probative effect of circumstantial evidence is not that delineated by appellant but rather is better illustrated by the rule which states in substance, that the jury need only be satisfied of the defendant's guilt beyond a reasonable doubt on all the evidence.

In fact in Holland v. United States, 348 U.S. 121 (1954) the Supreme Court in answer to the contention (advanced here by appellant) that where evidence is circumstantial it must exclude every reasonable hypothesis except that of guilt in order to sustain a conviction, stated at page 140:

"The better rule is that when the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

Appellant in his brief attempts to substitute his evaluation of the evidence for that of the trier of fact. Appellant is undoubtedly aggrieved at the decision of the trier of fact, and complains that although the trial judge did not swallow the "pills" defense [R. T. 114] the conviction should be reversed. Appellant ignores the fact that the duty and obligation of the trier of the facts is to evaluate and weigh all the evidence, and if conflicts in testimony or evidence have been brought to light during trial, the verdict of guilty or not guilty is the ultimate result of the weighing of the evidence. Stated conversely, the verdict of guilty meant that after a consideration of the sum total of the evidence, the trier of fact decided that every hypothesis but guilt had been eliminated.

United States v. Tutino, 269 F.2d 488 (2 Cir. 1959);

United States v. Brown, 236 F.2d 403 (2 Cir. 1956).

Appellant offers in support of his position his "assumption" (appellant's brief, pp. 5, 7) that a thorough search was not made

by Watson. As appears on pages 69 and 70 of the Reporter's Transcript, appellant only asked Agent Watson if he had searched the mouth and rectum of Riely. Upon the negative answers elicited to those two questions appellant bases his assumption. The Government submits that the assumption is not valid in light of the otherwise unchallenged testimony that Riely was searched before and after both purchases. Continuing, nothing was brought out during the trial that could attach any importance to the failure to examine the mouth and rectum of Riely. This is particularly damaging to appellant in light of the continuous (except for the few minutes during the second buy) surveillance maintained by Agent Watson. Watson, during both purchases, had Riely under actual surveillance at the moments Riely received the heroin and immediately thereafter, and stated that the heroin placed in Riely's hand [R. T. 92] by appellant, both times, was immediately turned over to Watson. There was no opportunity, necessity, or possibility of Riely first removing and then giving Watson anything (if anything there was) secreted in Riely's bodily orifices.

C. CROSS-EXAMINATION OF GOVERNMENT'S WITNESSES WAS NOT IMPROPERLY LIMITED.

Firstly, it needs no affirmation by the Government to acknowledge the rule that cross-examination of a witness is a cardinal right of a litigant. Secondly, at the factual level the contention that cross-examination was curtailed is erroneous. The record is

replete with constant affirmations by the Court that cross-examination would not be curtailed [R. T. 28, 29, 31, 34, 44, 50, 56, 69, 70, 80, 86] nor was it curtailed.

In the case of United States v. Massino, 275 F.2d 129 (2 Cir. 1960), quoted at great length by appellant, the facts therein and the thrust of that holding is opposite to the situation here. In Massino the Assistant United States Attorney personally requested and obtained from the state authorities a quashing of a state indictment. In the instant matter, as set forth by appellant in his many offers of proof, appellant sought to explore the possible involvement of the witness and the appellant with the state authorities [R. T. 32, 58]. Finally, all questions relating to any promised immunity were allowed [R. T. 33-4, 54, 76-7, 82-3]. In fact, at page 61 of the Reporter's Transcript, the Court itself asked the following question:

"Mr. Riely, has anyone promised you any immunity or any special benefits or that you would receive any particular leniency in any particular case for your services in this matter?

"(The Witness) None, whatever." (emphasis added)

Clearly then, the cross-examination allowed in this case was proper. In fact in Russell v. United States, 288 F.2d 520 (1961), this Court laid down the rule as to cross-examination, which rule is particularly appropriate to this case, when it stated at page 523:

"The Court stated he would not bar any inquiry as to any promises of leniency made by someone else. This was not a case where no cross-examination at all was allowed of the witness." [Emphasis added]

Inviting the Court's attention to the cases of Spaeth v. United States, 232 F.2d 776 (6 Cir. 1956) and Thurman v. United States, 316 F.2d 205 (9 Cir. 1963) cited by appellant in support of his contention that cross-examination was unduly restricted, the Government respectfully contends that neither case is authority for the appellant's position.

Thurman is pointedly concerned with the effect of the cross-examination upon the jury. In fact the Thurman court stated at page 206 that:

"Appellant was entitled to explore it fully and to have the benefit of whatever effect it might have had upon the jury." [Emphasis added]

In the instant matter, tried by the Court without a jury, such concern is obviously negated.

Further, unlike Spaeth and Thurman the witness in this case was not under indictment nor incarcerated nor awaiting sentence under a plea of guilty.

In fact the Reporter's Transcript commencing at page 31, through page 34, refers specifically to the testimony that appellant was seeking relative to the question of immunity, and at no point in the offer of proof contained on pages 22 and 33 of the Reporter's

Transcript was there any reference to a factual situation that would invoke either the Thurman or Spaeth rule. Further in this regard, the extent of the cross-examination allowed by the lower court, including the court's own questioning, clearly removes this matter from the purview of Thurman or Spaeth. Finally, in Spaeth, at page 778, the offer of proof related to a specific crime committed by the witness, related to his current confinement in a Federal institution and finally that the testimony sought related to a "case" that the witness had mentioned on his direct examination.

All of which, as above stated, is distinctly different from the thrust of the offer of proof made herein. In the instant matter appellant offered to prove by cross-examination that the witness might have been involved with the appellant in a prior matter that resulted in the appellant's incarceration for a period of six months [R. T. 32-33]. Objection to this line of questioning was sustained, but appellant was otherwise not limited in his cross-examination.

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the judgment below affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jules D. Barnett
JULES D. BARNETT

NO. 20953

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FOR THE NINTH CIRCUIT

ARTHUR LIRA AYALA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
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CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Central Division, adjudging appellant to be guilty as charged on all counts of a three-count indictment at the conclusion of a jury trial.

The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF CASE

On September 15, 1965, the Federal Grand Jury for the Southern District of California, Central Division, returned a three-count indictment in which appellant was charged in Count One with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 867 grams of marihuana on August 23, 1965, in Count Two with knowingly and unlawfully selling and facilitating the sale of 867 grams of marihuana on August 23, 1965, to Antonio A. Celaya, an Agent of the Federal Bureau of Narcotics, and Count Three with knowingly and unlawfully transferring 867 grams of marihuana to Agent Antonio Celaya, of the Federal Bureau of Narcotics without obtaining from him a written order on a form issued for that purpose by the Secretary of the Treasury of the United States.

After appellant's arraignment and plea of not guilty to all counts of the indictment, appellant was tried on Monday, October 25, 1965, by a jury before the Honorable William J. Lindberg, United States District Judge, and was convicted of the offenses alleged in Counts One, Two and Three of the Indictment.

On November 4, 1965, appellant was adjudged guilty as charged and convicted and sentenced by the Honorable William J. Lindberg to five years imprisonment on each Count One, Two and Three to commence and run concurrently. Appellant thereafter filed timely notice of appeal.

III

ERROR SPECIFIED

Whether the trial court properly refused to instruct the jury on the question of entrapment.

IV

STATUTES INVOLVED

Counts One and Two of the Indictment allege a violation of Section 176(a) of Title 21, United States Code, which provides in pertinent part:

"Whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than 20 years, and in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. "

Count Three of the Indictment alleges a violation of Section 4742(a), Title 26, United States Code, which provides in pertinent part:

"(a) General requirement --

"It shall be unlawful for any person whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

V

STATEMENT OF FACTS

Federal Bureau of Narcotics Agent Antonio A. Celaya testified that he first saw the defendant on August 23, 1965, in front of the defendant's barbershop at 9849 Main Street, Cucamonga, California at approximately 9:30 P. M. [R. T. 10]. ^{1/} Agent Celaya testified that on the above date he was introduced to the defendant by a person named Jimmy Rodriquez, an informant. That they used a cover story when introduced to the defendant [R. T. 35]. Agent Celaya testified that the defendant said that he had one kilo of marihuana and that he wanted \$140.00 for this kilo. There was a discussion as to price, with a final agreement of \$140.00 for

^{1/} "R. T. " refers to Reporter's Transcript of Record.

the kilo of marihuana [R. T. 11]. Celaya testified that the defendant then walked to the rear of the barbershop, and into a grove of trees behind several buildings. Ayala reached into a rabbit hutch and removed two paper bound bricks of marihuana, and handed them to him. Celaya said that he then paid the defendant \$140.00 government funds and left the area [R. T. 11]. Agent Celaya testified that on September 8, 1965, the defendant in his presence was interviewed by Agent Watson of the Federal Bureau of Narcotics after being told his constitutional rights [R. T. 14]. The defendant admitted to Agent Watson that he sold Agent Celaya narcotics on August 23, 1965 [R. T. 15]. Agent Celaya testified that at the time defendant handed him the narcotics, the defendant did not request nor was he handed a written order form for the transfer of marihuana [R. T. 23]. Agent Celaya also testified that on September 30, 1965, he served the defendant with a demand for an order form at the defendant's place of business, and that it was not produced [R. T. 24].

There was a stipulation after the testimony of Agent Celaya between the attorney for the appellant, and appellee that Government Exhibit No. 1 is marihuana and that the chain of possession had been established [R. T. 44].

Agent Harry J. Watson of the Federal Bureau of Narcotics testified that he had a conversation with defendant Ayala on September 8, 1965, at the defendant's place of business in Cucamonga, California. He said that he informed the defendant of his constitutional rights, and that defendant Ayala told him that he had

obtained the marihuana in Mexico from a man known as "El Guyo". Agent Watson asked the defendant why he was not able to furnish additional marihuana. The defendant said that he did not have the money to bring the marihuana from Mexico to Cucamonga [R. T. 47]. Agent Watson testified that he served the defendant with a written notice to produce a marihuana transfer order form. The defendant told him that he had no Government transfer form [R. T. 47].

Defendant, Arthur Ayala testified that on August 23, 1965, Agent Celaya of the Federal Bureau of Narcotics and a man by the name of Jimmy came to his barbershop [R. T. 60]. He said that he had known Jimmy about nine months prior to the 23rd day of August [R. T. 63]. Ayala stated that he sold marihuana to Agent Celaya after first seeing him about a half-hour on the 23rd of August [R. T. 67]. Ayala testified that he took the marihuana from the ground where it had been buried from three to five weeks in the backyard of his shop. He testified that he told no one where it was buried [R. T. 68]. He said that he did not know the marihuana had been illegally imported [R. T. 66].

VI

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE QUESTION OF ENTRAPMENT.

As defined in the legal sense in Ortega v. United States, 348 F.2d 874 (9th Cir. 1965), quoting Black's Law Dictionary, "entrapment" means "the act of a government officer or agent inducing a person to commit a crime not contemplated by him. . . ."

Mathes and Devitt, "Federal Jury Practice and Instructions" on page 135, defines unlawful entrapment as follows:

"Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case."

In order to determine whether the above principles have application in the present case it will be necessary to examine the testimony of the witnesses in detail on this matter.

Defendant, Arthur Ayala testified that on August 23, 1965, Agent Celaya of the Federal Bureau of Narcotics and a man by the name of Jimmy came to his barbershop [R. T. 60]. He said that he had known Jimmy about nine months prior to the 23rd day of August [R. T. 63]. Ayala stated that he sold marihuana to Agent Celaya after first seeing him about a half-hour on the 23rd of

August [R. T. 67]. Ayala testified that he took the marihuana from the ground where it had been buried from three to five weeks in the backyard of his shop. He testified that he told no one where it was buried [R. T. 68]. He said that he did not know the marihuana had been illegally imported [R. T. 66].

Defendant Arthur Ayala testified that he knew a person by the name of Ray. Ray owed him \$150 to \$175 dollars [R. T. 62]. He said that Ray came to his barbershop about a month prior to the 23rd of August, and said that he couldn't pay him, and left with him a bundle containing marihuana. Ayala testified that Ray asked him to see what he could do with the marihuana [R. T. 64]. Ayala said that he had known Ray for five years; that in the last six or eight months prior to August 23rd, Ray had not come to his barbershop often. He said that he had been after Ray to pay him. Ayala testified that he had no knowledge as to whether Ray was a special employee of the Narcotics Bureau [R. T. 62-63].

Federal Narcotics Agent Antonio A. Celaya testified to the following concerning "Ray" [R. T. 39-42]:

"Q. Mr. Celaya, isn't it a fact that you had a conversation with Mr. Ayala there for some time about selling you marijuana on August the 23rd?

"A. We spoke at some length, yes, sir.

"Q. Yes. Didn't he tell you that some fellow by the name of Ray had left that marijuana in his place of business?

"A. No, sir.

"Q. Was there ever any conversation with you that day concerning a person by the name of Ray?

"A. Not that I recall, sir.

"Q. Do you know a man by the name of Ray?

"A. I know several men by the name of Ray, sir.

"Q. Do you know anybody by the name of Ray who lived in that area in San Bernardino County?

"A. No sir, I don't.

Q. Do you know anybody by the name of Ray who has worked as a special employee of your department?

"A. Yes, sir.

"Q. Was that about August the 23rd or about a month prior to that date?

"A. Sir, if I'm not mistaken the Ray who worked as an informant for the Bureau is in jail and was in jail at that time.

"Q. Well, was he in jail about one month or two months prior to August, the 23rd?

"A. He well could have been, sir. I don't recall when he went to jail.

"Q. All right now, didn't Mr. Ayala tell you that a man by the name of Ray owed him some money and that Ray brought this marijuana to his business, his barber shop, and left that marijuana there?

"A. I don't recall him saying that, sir.

"Q. My asking you the question does not refresh

your memory about that portion of the conversation.

"A. No, sir, I don't recall that conversation.

"Q. How long prior to August the 23rd did you hear from Ray or have any contact with him?

"A. Six months, perhaps longer.

"Q. Did that have something to do with marijuana, your dealings with him?

"A. No, sir.

"Q. Did it have to do with narcotics?

"A. Yes, sir.

"Q. Isn't it a fact that Ayala told you that Ray had left that marijuana with him?

"A. No, sir, he did not tell me that."

Not one answer by Agent Celaya indicates that this alleged "Ray" had any connection with this case or at the relevant times in question was a Government informant or employee.

The testimony of Agent Watson concerning "Ray" is as follows [R. T. 50]:

"Q. Do you know a man by the name of Ray?

"A. I know many people by the name of Ray.

"Q. Yes, sir, do you know anybody that you have used as a special employee by the name of Ray?

"A. Many.

"Q. Did you use one who lived or had any transactions concerning marijuana in the San Bernardino

area about August of 1965?

"A. No, sir.

"Q. Did you use anybody by the name of Ray in San Bernardino County prior to August the 23rd?

"A. No, sir.

"Q. These several Rays that you know about, do they reside here in Los Angeles to your knowledge?

"A. Most of them live in this area, this general area.

"Q. Do any of them live toward the Pomona area?

"A. Not to my knowledge. "

The testimony of Agent Watson does not in any way connect " Ray " with this transaction; it cannot be inferred that Ray was a Government employee or informant.

On direct examination Agent Watson testified that he had a conversation with defendant Ayala on September 8, 1965. Ayala told him at that time that he had obtained the marijuana in question from Mexico from a man known as "El Guyo". He also said the reason he was not able to furnish additional marihuana was that he did not have the money to bring the marihuana from Mexico to Cucamonga.

The above statements are directly contrary to what defendant Ayala testified to at the trial. The statements are also contrary to appellant's theory of entrapment, and shows its speciousness.

It is well settled that the doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not an officer of the law.

Henderson v. United States, 237 F.2d 169

(5th Cir. 1956);

Knott v. United States, 163 F.2d 984 (5th Cir. 1947);

Jindra v. United States, 69 F.2d 429, 431

(5th Cir. 1934);

Beard v. United States, 59 F.2d 940 (8th Cir. 1932).

The defendant's theory of entrapment is clearly stated on pages 61 and 62 of the Reporter's Transcript. Appellant's attorney, in an offer of proof before the jury, indicated the following facts which he intended to prove: Ray owed the defendant a sum of money. Approximately a month or six weeks prior to the 23rd of August, Ray came to Ayala's barbershop and left marihuana with the defendant for safekeeping. He did not return to pay the money. Subsequently Jimmy came to the defendant's place of business with Agent Celaya; that Jimmy knew Ray. Agent Celaya was introduced as a man from Ventura who knew Ray, and that Celaya asked if Ray hadn't left some marihuana with the defendant. That after considerable conversation Ayala produced the marihuana in question, Celaya paid him \$140.00 for it.

Appellant's attorney failed to elicit any testimony from any witnesses which established the factual situation outlined in his offer of proof. There was no evidence introduced that Ray knew Jimmy, the informant. There was no evidence that Celaya knew

Ray, and no evidence that Agent Celaya had asked if Ray hadn't left some marihuana with the defendant. The lack of testimony on the above, goes to the heart of appellant's theory of entrapment, "frame up" or the planting of contraband in the defendant's possession by the so-called "Ray" who is alleged to be a government informant.

Submission to the jury is not necessary when evidence of entrapment is entirely lacking, or there is no substantial evidence of same, or the uncontradicted evidence discloses no entrapment.

In Crisp v. United States, 262 F.2d 68 (4th Cir. 1958), the Court of Appeals for the Fourth Circuit held that, where the evidence showed that a government agent purchased narcotics from the defendant through another party who did not know the official status of the agent, and where the party to whom the defendant gave the narcotics allegedly owed the defendant money, which the defendant would not receive without the sale of the narcotics, the evidence was insufficient to raise a jury question as to the defense of entrapment.

Vamvas v. United States, 13 F.2d 347
(5th Cir. 1926);

Swallum v. United States, 39 F.2d 390
(8th Cir. 1930);

United States v. Klein, 108 F.2d 458
(7th Cir. 1939);

United States v. Markham, 191 F.2d 936
(7th Cir. 1951);

United States v. Pisano, 193 F.2d 355

(7th Cir. 1951).

The testimony of Agent Celaya regarding the purchase of marihuana [R. T. 10, 11] shows a negotiation concerning the price of the marihuana. Following this negotiation, the defendant went directly to the rear of the barbershop and into a grove of trees, reached into a rabbit hutch and removed two bricks of marihuana. This testimony indicates a readiness and willingness on the part of defendant Ayala, and negates possible entrapment.

The mere act of an officer in furnishing the accused an opportunity to commit the crime when the criminal intent was already present in the accused's mind is not ordinarily entrapment.

Bloch v. United States, 226 F.2d 185

(9th Cir. 1959);

Sorrells v. United States, 287 U.S. 435 (1932);

Silva v. United States, 212 F.2d 422

(9th Cir. 1954);

Demos v. United States, 205 F.2d 596

(5th Cir. 1953).

The defendant cites Carson v. United States, 310 F.2d 558 (9th Cir. 1962). In that case, the Court found that the evidence if fully credited by the jury, "tended to show that the criminal design with respect to the transaction in question originated with the employees of the Government and that Carson acquiesced therein only by reason of economic duress devised and exerted by these employees. "

In the case before the trial Court, there was no evidence of economic duress or any duress by Government agents whatsoever, or that Government agents did anymore than afford the defendant an opportunity to commit the crime in question.

Factually the two cases are not in point.

The defendant also cites Smith v. United States, 331 F.2d 784 (D. C. Cir. 1964), as authority for his position, but that case is factually quite different from the case before the Court. In the Smith case, there was testimony, that the defendant Smith did not own, but was temporarily keeping for one Paris, contraband. Paris had given the narcotics to the defendant a half-hour or forty-five minutes before the defendant was arrested. Defendant Smith had testified that he had heard that Paris was a police informer. The defendant's testimony on this point was not rebutted by the Government.

In the case before the trial Court, there was no evidence that Ray was a Government employee or informant. Also the time interval during which the defendant possessed the contraband was not one-half hour as in Smith, but a month to six weeks according to the testimony of defendant Ayala.

The defendant also cites Johnson v. United States, 317 F.2d 127 (D. C. Cir. 1963), in support of his position. In the Johnson case the Court said that the issue of entrapment arose because the conduct charged as criminal could be found to be attributable to the action of the officer (1) in supplying Government funds for the purchase of the narcotics, (2) through the direct

channel of an intermediary to the accused, (3) allowing the accused after the purchase and in the presence of the officer to retain some of the narcotics, (4) and the fact that at all times the officer provided transportation for execution of the plan.

The Court in Johnson said,

"We do have, however, the furnishing by the officer of Government money, itself a persuasive factor, to an intermediary acting for the officer in carrying out the transaction, with a 'reward' to the accused of a part of its fruit. This is enough to raise a factual crime of official inducement for the jury to decide one way or the other. "

In this case, the sale of the narcotics was directly to an agent of the Federal Bureau of Narcotics. The fact of letting the defendant retain some of the narcotics in Johnson was entirely missing in the case before the trial Court.

VII

CONCLUSION

1. Because there was no evidence in the entire transcript that anyone named "Ray" was employed as a Government employee or informant;

2. and, because there was no evidence of inducement or coercive tactics on the part of Government agents;

3. and because there is abundant evidence of a readiness and willingness on the part of defendant Ayala to engage in the sale of narcotics;

The trial Court did not err in refusing to instruct the jury on the issue of entrapment, and the judgment of the trial Court should be affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Marcus O. Tucker

MARCUS O. TUCKER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS HUGHES, JR.,)

Appellant,)

vs.)

No. 20955 ✓

UNITED STATES OF AMERICA,)

Appellee.)

_____)

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS HUGHES, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20955

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the District of Nevada, adjudging the Appellant guilty as charged in Count I of the Indictment.

The offense occurred in the District of Nevada. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF PLEADINGS AND FACTS

The Appellant, on May 6, 1965, was charged in a two count Indictment in the United States District Court for the District of Nevada with violating Title 21, United States Code, Section 174 [R.4-5].

1. "R" refers to Record on Appeal

The Appellant, prior to trial, filed a Motion to Suppress Evidence [R.6-10]. A hearing on Appellant's Motion to Suppress Evidence was held on September 23, 1965 [R.11] [R.T.M.S.2-80]².

The trial Court granted Appellant's Motion to Suppress Evidence of narcotics referred to in Count II of the Indictment [R.12], and the Government dismissed Count II of the Indictment [R.T.3]³. The jury found the Appellant guilty as charged in Count I of the Indictment [R.16].

The Appellant filed a Motion for Judgment of Acquittal Or In The Alternative For A New Trial [R.21-22] which was denied by the Court on November 15, 1965 [R.3].

The Appellant was sentenced on December 13, 1965, and Judgment of the jury's verdict was entered [R.26]. The Appellant was sentenced and committed to the custody of the Attorney General for a period of five years [R.3,25]. The Appellant filed his Notice of Appeal on December 13, 1965 [R.27,28].

The trial Court granted the Appellant various extensions of time in which to docket the Record on Appeal [R.32-37].

2. "R.T.M.S." refers to Reporter's Transcript Motion to Suppress

3. "R.T." refers to Reporter's Transcript of Trial Proceedings

STATEMENT OF THE CASE

Detective Sergeant John McCarthy, of the Las Vegas, Nevada Police Department, placed Appellant's house, at 1708 Carey Street, Las Vegas, Nevada, under surveillance at approximately 8:15 p.m. on April 22, 1965 [R.T.50-52]. Some minutes earlier, Detective McCarthy had been contacted by his partner, Detective Staten [R.T.51], that the Appellant's 1965 Plymouth two-door car was parked in front of a pool hall in West Las Vegas [R.T.22], that Detective Staten had parked across the street from the pool hall and noticed Appellant's car there [R.T.24].

Detective Staten began the surveillance of Appellant's apartment at approximately 8:15 p.m., and Detective McCarthy relieved him at 9:15 p.m. [R.T.52]. The detective was located some 500 feet away from the Appellant's residence [R.T.52] and was viewing the residence through high-powered binoculars [R.T.53]. Detective McCarthy was in an unmarked police car [R.T.55].

Detective McCarthy had known the Appellant for approximately six years prior to this time. When the initial surveillance was effected at 8:15 p.m., the Appellant's car was parked in front of his residence [R.T.73]. At approximately 10:15 p.m., the Appellant came out the front door of his residence and walked to the curb where his car was parked

[R.T.53]. The Appellant was wearing a light-colored Levi jacket, a red sweater-shirt and bedroom slippers [R.T.55]. Detective McCarthy observed the Appellant walk from his residence to where his vehicle was parked. The Appellant appeared to be carrying some object in both hands across his stomach [R.T.54]. The Appellant looked up and down the street as he approached the sidewalk, walked around to the driver's side of the car, opened the door, bent over and put something underneath the front seat of the car [R.T.54-55]. The Appellant then got into the car, started the car up, and headed west on Carey Street to Comstock, where he made a left turn and headed in the direction where Detective McCarthy was parked [R.T.55].

Detective McCarthy was seated in his vehicle facing the Appellant after the Appellant had made a left turn onto Comstock. Detective McCarthy drove his car forward, made a U-turn and followed the Appellant. He turned on a red light, at which time the Appellant pulled his vehicle over and stopped [R.T.56]. The Appellant kept the speed of his vehicle constant [R.T.77].

Detective McCarthy got out of his car, walked over to the Appellant and asked him how he was [R.T.56]. There was no one else present at this time but the Appellant and

Detective McCarthy. Detective McCarthy felt the Appellant knew him since he had talked to him in the past [R.T.57,78-79].

When Detective Staten arrived, the Appellant was seated behind the steering wheel of his car. The Appellant was asked if he had been down to the pool hall, which he denied [R.T.57]. Small talk was exchanged and Detective McCarthy asked the Appellant, "If he would object if we searched him". The Appellant made no response, but he got out of his car. The Appellant took everything out of his pockets, laid the contents on the hood of his car and was patted down by Detective McCarthy.

The Appellant was not under arrest at that time. After he was searched, the Appellant was told to put his personal belongings back into his pockets [R.T.80]. Then Detective McCarthy asked the Appellant if he had any objection to Detective McCarthy's looking into his car. Appellant replied, "Go right ahead". Detective McCarthy sat in the driver's seat of the car, ran his hand up under the dashboard, attempted to open the console glovebox and asked Appellant's assistance in opening the console. Detective McCarthy reached under the seat on the driver's side and found a two-ounce Maxwell House Coffee jar [R.T.59]. After the jar was found, the Appellant was asked if he had more, and the Appellant replied in the negative and said that he did not know what

the Detective was talking about [R.T.61].

Detective McCarthy, after finding the Maxwell House Coffee jar, which was marked and admitted into evidence as Exhibit 6 [R.T.33,102], did not open the jar until after the Appellant had been placed under arrest. However, he did look at the contents of the jar and observed colored toy balloons [R.T.66-67]. Eleven balloons containing No. 5 capsules were found in the jar [R.T.59-61]; and the capsules, after a field test, were found to contain narcotics [R.T.13,69].

Detective McCarthy replaced the jar and its contents in the spot where he found it. The Appellant was then placed under arrest. It was not until after the Appellant was arrested that the capsules and the balloons inside the Maxwell House Coffee jar were tested for narcotic origin.

The Appellant rested his defense, in part, on the testimony of Louis Lee Crockett that the Appellant had returned from a trip to Phoenix, Arizona on April 22, 1965 [R.T.143], entered his residence at approximately 8:20 p.m. [R.T.144], and never left his residence that entire day. The Appellant slept the entire day [R.T.157] and left his house for the first time that day at about 10 p.m. [R.T.159]. Louis Crockett took the Appellant's automobile on the morning of April 22, 1965, and left it for Appellant's brother, Willie Hughes [R.T.144-145] Willie Hughes obtained possession and keys to the car from

Louis Crockett in front of a pool hall, and the car was returned to the Appellant at about 8:30 p.m. on the evening of that day [R.T.123-125].

The Appellant moved for a Judgment of Acquittal when the Government rested its case in chief [R.T.103,117]. The Court denied the Appellant's Motion [R.T.103,117]. The Appellant filed a written Motion to View Premises [R.17-18] and submitted argument in support of the Motion [R.T.233-235]. Thereafter, when all the evidence was closed, Appellant again moved the Court for Judgment of Acquittal [R.T.235]. The Motion was denied by the trial Court [R.T.237]. After a verdict had been entered by the jury finding the Appellant guilty as charged in Count I of the Indictment, the Appellant filed a Motion for Judgment of Acquittal Or In The Alternative For A New Trial [R.19-23]. The trial Court denied the Motion on December 15, 1965 [R.8].

SPECIFICATIONS OF ERROR

1. The trial Court abused its discretion in denying Appellant's Motion to View Premises.
2. The trial Court erred in denying Appellant's pre-trial Motion to Suppress as evidence the narcotics alleged in Count I of the Indictment.
3. The trial Court erred in not granting Appellant's Motion for Judgment of Acquittal at the conclusion of the Government's case in chief and the close of all evidence.
4. The trial Court erred in denying Appellant's

Motion for Judgment of Acquittal or Judgment for a new trial.

S U M M A R Y

The Appellant was indicted, tried and convicted for violating Title 21, United States Code, Section 174.

The Appellant contends that the trial Court abused its discretion in denying Appellant's Motion to View Premises whereby the testimony of the two arresting officers would have been strongly impeached. Additionally, the Appellant urges that he did not consent to a search of his vehicle by Detective McCarver and that the fruits of the search should not have been admitted into evidence.

A R G U M E N T

I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VIEW THE PREMISES

The Appellant filed a written Motion to View Premises [R. 17-18]. The theory, or reason for the Motion, was to show that it was visually impossible for Detective Staten to view or observe the Appellant in the S and W Pool Hall as he had testified [R.T. 22, 24, 34 - 35, 199, 203 -205, 208], and that terrain feature and surveillance distance would not enable Detective McCarthy to observe the Appellant. The

Trial Court, after argument on the Motion, denied the Motion [R.T. 233 - 235].

It is discretionary with the Court, whether or not the jurors may visit the scene of a crime. C.I.T. Corporation v. United States, 150 F. 2d 85 (9th Cir. 1945); Neufield v. United States, 118 F.2d 375 (U.S.C.A. D.C. Cir. 1941). There are few legal precedents construing or defining what constitutes an abuse of discretion in denying a Motion to View Premises. The Fifth Circuit in Le Prell v. United States, 192 F.2d 132 (1951) placed significance on whether the matters which the jury could have seen by viewing the premises were the subject of full testimony. In United States v. Pagano, 207 F.2d 884 (2nd Cir. 1953) and Neufield v. United States, supra, the appellate courts held there was no abuse of discretion because photographs informed and illustrated to the jurors what they would observe upon viewing the premises.

The government justified Detective McCarthy's stopping the Appellant [R.T. 56] on information supplied to Detective McCarthy by Detective Staten [R.T. 24 -25, 51]. That Staten observed the Appellant in the S and W Pool Hall in the company of other narcotics users [R.T. 24]. Detect-

ive Staten testified he looked through the door of the Pool Hall when he observed the Appellant [R.T. 48], that the pool Hall had a glass front, but it was boarded up [R.T. 36]. Detective Staten testifying in rebuttal states he observed the Appellant both through the door [R.T. 200] and through the window [R.T. 208].

Simon Walker, the owner of the S and W Pool Hall, testified as a witness for the Appellant that the lower surface of the pool hall's front window was completely covered [R.T. 187] to a height of six feet and that he could not see into the pool hall [R.T. 188], thus contradicting the testimony of Detective Staten.

Detective Staten also testified that he observed the Appellant in the pool hall from a surveillance point at a service station across the street from the pool hall [R.T. 24]. This testimony was also contradicted by Simon Walker who testified that he could only observe silhouettes in the pool hall from the same position [R.T. 192].

Detective Staten provided Detective McCarthy with information upon which the government relies as the basis for stopping the Appellant. Staten's testimony was contradicted by Simon Walker. The condition of the pool hall at

the time of trial was unchanged from April 22, 1965. [R.T. 186]. If it were visually or physically impossible for Staten to observe the Appellant in the pool hall, then the jury was entitled to know. The jury could only determine the physical facts from a view of the premises.

The area immediately in front of the Appellant's residence, and Detective McCarthy's surveillance point, were also included in Appellant's Motion to View Premises [R. 17 - 18]. The Appellant wanted to show the jury, from a view of the premises that Detective McCarthy could not, from his surveillance point, observe the Appellant leaving his apartment carrying an object in his hand and placing the object under the driver's seat of his automobile. The visual surveillance of Detective McCarthy took place in the night time [R.T. 51 - 53], thus, if the jury viewed this area and concluded that Detective McCarthy could not visually observe the Appellant, then the only logical conclusion to be drawn from stopping the Appellant would be lack of justification.

The government did offer photographs of the area that were received into evidence as exhibits 10 and 11 [R.T. 215 - 220]. These photographs, it is submitted, did

not show the jury what they would have observed from Detective McCarthy's surveillance point viewing the Appellant's residence.

The physical condition of the S and W Pool Hall was not fully testified to. The testimony of the witnesses for both the government and the defense could only leave doubt in the minds of the jurors. This doubt and confusion could only be completely removed by the jury's inspection and view of the S and W Pool Hall. Similarly, whether the Appellant could be observed, as testified to by Detective McCarthy, could, in the absence of Detective McCarthy's testimony, only be shown or proved by the jury's visual observation of the Appellant's residence from the surveillance point used by Detective McCarthy.

II

THE TRIAL COURT ERRED IN DENYING

APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS AS EVIDENCE

THE NARCOTICS ALLEGED IN COUNT I OF THE INDICTMENT

The Appellant filed a pre-trial motion under Fed. R. Crim. P.41 (e) to suppress as evidence the narcotics alleged in both counts of the Indictment [R.6-10]. The trial Court, after a hearing on the motion [R.T.M.S.2-80], denied Appellant's motion with respect to Count I and granted the motion with respect to Count II [R.12].

The evidence at the hearing on the Motion to Suppress

showed Detective McCarthy of the Las Vegas, Nevada Police Department, on April 22, 1965, had placed the Appellant's residence at 1708 Carey Street, Las Vegas, Nevada, under surveillance. The surveillance was initiated at 9:00 p.m. on that date. The Appellant's 1965 red Plymouth two-door sedan was parked in front of the Appellant's residence during the surveillance [R.T.M.S.4-6].

Detective McCarthy observed the Appellant from a distance of 300 yards by using binoculars. The Appellant left his residence at 10:00 p.m. and appeared to be carrying something in his hands. The Appellant walked to the driver's side of his car, opened the door and appeared to reach under the seat. The Appellant then got into his car, drove away, and headed in the direction where Detective McCarthy was stationed [R.T.M.S.4-8].

The Appellant drove by Detective McCarthy and apparently recognized McCarthy. Detective McCarthy then made a U-turn in his unmarked police vehicle and followed the Appellant for approximately three blocks. Detective McCarthy applied a red light and the Appellant pulled over to the side of the road. McCarthy got out of his car and walked to the Appellant's car. McCarthy asked the Appellant to get out of his car, which the Appellant did. The Appellant

knew Detective McCarthy was a police officer from prior dealings. The Appellant was asked to remove the contents of his pockets and place the items on the hood of his car. The Appellant was then patted down [R.T.M.S.9-11].

At that point, the following discussion took place [R.T.M.S.12]:

"Q. Did you have any discussion with the Defendant at that point?"

"A. I asked him if he objected if I looked in his car and he said, 'No, go right ahead'."

"Q. Did you specifically tell him with regard to looking in his car?"

"A. I asked him if I could, if he had any objection if I looked in the car and he said, 'No.' "

Detective McCarthy testified he told the Appellant he wanted to search his car for "stuff" [R.T.M.S.13]. The Appellant was not at that time under arrest nor was he advised he did not have to allow a search of his car [R.T.M.S.14]. By McCarthy's testimony, the Appellant, in reply to McCarthy's request to search, stated, "Go right ahead" [R.T.M.S.14]. McCarthy entered Appellant's car and conducted a search of the car. McCarthy found a two-ounce Maxwell House Coffee jar underneath the front seat of Appellant's car. Appellant

denied knowledge of the jar and, at that point, Appellant was placed under arrest [R.T.M.S.17].

The jar contained differently colored toy balloons [R.T.M.S.29]. The contents of the jar were not subjected to narcotic field tests at the time of the arrest [R.T.M.S. 33].

The Appellant testified at the hearing on the Motion to Suppress. His testimony corresponded with Detective McCarthy's testimony up to the time Appellant's car was searched [R.T.M.S.35-38]. According to the Appellant, McCarthy entered his car and was searching the car before the Appellant had the opportunity to protest [R.T.M.S.38].

The Appellant contended at the hearing on the Motion to Suppress, and still contends, that he was effectively arrested when initially detained by Detective McCarthy [R.T.M.S.10-12], and the narcotics found in the Maxwell House Coffee jar should have been suppressed as the fruits of an illegal search and seizure. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The facts then available to Detective McCarthy did not constitute sufficient probable cause by any standard for restricting the Appellant's movement. There was no showing the Appellant had violated any law and that his actions were as innocent

as the actions of any citizen.

There were no facts developed at the hearing on the Motion to Suppress to warrant a belief by Detective McCarthy that the Appellant had committed an offense. When the Appellant's movement and liberty were restricted by Detective McCarthy, his arrest was complete. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed 2d 134 (1959). The circumstances surrounding Appellant's arrest appear similar to Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, 11 L.Ed 2d 604 (1964) where, after Beck's warrantless arrest without probable cause, followed by a search, incriminating evidence was discovered which the Supreme Court of the United States held was inadmissible.

Although the Court did not make findings when it ruled on the Motion to Suppress, the Court did make findings during the trial that there was no arrest when the Appellant was stopped, that Appellant gave a valid consent to search his vehicle, and the ensuing search and seizure was not unreasonable [R.T.116-117]. Assuming this finding was the basis for the Court's denying Appellant's Motion to Suppress, it is contended that Appellant did not consent to the search of his vehicle, as established by judicial guidelines. A consent to search is not to be lightly inferred. United

States v. Viale, 312 F.2d 595 (2nd Cir. 1963). The presumption is against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937).

The credibility of Detectives McCarthy and Staten and the Appellant is not controlling. The real issue is whether the evidence offered by the government meets the standard required. This Circuit in United States v. Page, 302 F.2d 81, 83-84 (1962) announced judicial guides for use in determining whether a consent to a search was, in fact, given. The consent must be unequivocal and specific and freely and intelligently given. It must be shown that the individual has waived his rights. Coercion, implicit in situations where consent is given under color of badge, must be shown not to exist.

The Appellant, while driving his automobile, was pulled over after a red light was applied by Detective McCarthy [R.T.M.S.10]. The Appellant, from prior dealings, knew McCarthy was a police officer [R.T.M.S.11]. Appellant was required to remove himself from his car, empty his pockets and was patted down [R.T.M.S.10-11]. This was all done under color of badge.

McCarthy asked Appellant if he [Appellant] objected

if he [McCarthy] looked in his car [R.T.M.S.12]. The word "look", and not search, was used by McCarthy. The Appellant was not specifically told, other than use of the word "stuff", what McCarthy was looking for. Based on these facts and circumstances, the Appellant could not have given a clear and unequivocal consent to McCarthy. If McCarthy is believed, the consent was obviously not freely given. This Circuit in Channel v. United States, 285 F.2d 217 (1960), quoted with approval, Higgins v. United States, 93 U.S. App. D.C. 340, 209 F.2d 819:

"It follows that . . . words or signs of acquiescence in the search accompanied by denial of guilt, do not show consent; . . ."

The Appellant squarely denied giving Detective McCarthy consent to search his vehicle [R.T.M.S.37-38]. The Appellant's denial vitiates the alleged consent given to Detective McCarthy. The consent allegedly given by this Appellant is not as strong as the consent given in Channel v. United States, supra, and State of Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964), which required reversal. "The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." Cipres v. United States, 343 F.2d

95, 98 (9th Cir. 1965).

State law controls on the issue of the validity of an arrest without a warrant absent an applicable federal statute. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L. Ed. 210 (1948). The Appellant's arrest, by either the Appellant's theory or the trial Court's theory, took place in Las Vegas, Nevada [R.T.M.S.4,17,30]. The applicable Nevada Statute, N.R.S. 171.225⁴, defines arrest and N.R.S. 171.230⁵ defines how an arrest is made.

The Appellant was restrained of his liberty and movement by Detective McCarthy. No facts were established that justified Detective McCarthy's stopping the Appellant. Unlike Lipton v. United States, 348 F.2d 591 (9th Cir. 1965), no testimony was adduced that Nevada is an automobile-license state; and Appellant's car was subject to the vehicle code. There was no testimony that Detective McCarthy looked into Appellant's car and observed the narcotics, thereby giving him probable cause which would place the case under Busby v. United States, 296 F.2d 328 (9th Cir. 1961).

4. N.R.S. 171.225-"An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

5. N.R.S. 171.230-"An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention."

The facts do, however, fall within the scope of Porter v. Wilson, 245 F. Supp. 396, (U.S.D.C.N.D. Calif. S.D. 1965), in his opinion, District Judge Weigel, refuses to draw a distinction between detention for inquiry or interrogation and arrest. If there is detention of an individual, there must be reasonable justification for the detention. Most certainly, the evidence before the trial Court did not reflect reasonable justification for the Appellant's detention, prior to his arrest, and the fruits of the search, following the detention and prior to the arrest should have been suppressed. Further, detention without reasonable justification would indicate that a consent given during such detention would be coerced. Martinez v. United States, 333 F.2d 405 (9th Cir. 1964) (Koelsch, C.J., dissenting).

III & IV

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE IN CHIEF AND THE CLOSE OF ALL EVIDENCE.
THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR JUDGMENT FOR A NEW TRIAL.

The Appellant, at the close of the government's case in chief, moved the Court for a Judgment of Acquittal.

The motion was denied [R.T.103-117].

The motion was based on the Appellant's prior Motion to Suppress and on the fact it was not determined that the jar found in Appellant's vehicle contained narcotics until after Appellant's arrest. Detective McCarthy, after discovering the Maxwell House Coffee jar, did not open it, but merely looked at it and saw colored toy balloons [R.T.66-67]. There was no field test conducted at that time and prior to Appellant's arrest. McCarthy showed the jar to the Appellant [R.T.61] and then replaced the jar in its finding position and arrested the Appellant [R.T.61-62].

After the Appellant's arrest, it was determined for the first time by a Marquis Reagent Test that the capsules found in the toy colored balloons contained heroin.

The mere discovery of the Maxwell House Coffee jar under the driver's seat of the vehicle does not establish probable cause for Appellant's arrest. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963), Wong Sun v. United States, supra. The Appellant's arrest was not justified by the discovery of heroin in the Maxwell House Coffee jar. Henry v. United States, supra

Accordingly, the trial Court erred in not granting Appellant's motions for Judgment of Acquittal made during

The first part of the book is devoted to a general history of the United States from its discovery by Columbus in 1492 to the present time. It covers the early years of settlement, the struggle for independence, the formation of the Constitution, and the growth of the nation to its present boundaries. The second part of the book is devoted to a detailed history of the United States from 1789 to the present time. It covers the early years of the Republic, the struggle for the abolition of slavery, the Civil War, the Reconstruction, and the growth of the nation to its present boundaries. The third part of the book is devoted to a detailed history of the United States from 1865 to the present time. It covers the Reconstruction, the growth of the nation to its present boundaries, and the struggle for the abolition of slavery. The fourth part of the book is devoted to a detailed history of the United States from 1900 to the present time. It covers the growth of the nation to its present boundaries, the struggle for the abolition of slavery, and the growth of the nation to its present boundaries.

the trial [R.T.103-117] at the close of all evidence [R.T. 236-237] and the alternative motion for a new trial [R.19-23, 8].

C O N C L U S I O N

The trial Court erred, and the Judgment, accordingly, should be reversed.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED D. McCREARY,

Appellant,

vs.

No. 20979 ✓

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California State Prison,
San Quentin, California,

Appellee.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED D. McCREARY,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

No. 20979

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 224. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

On September 27, 1962, Fred D. McCreary, petitioner and appellant, was sentenced by the Superior Court of Alameda County to the state prison for the



term prescribed by law for the violation of the California Penal Code section 187 (murder) upon his plea of guilty (TR 3).¹/ Appellant did not appeal.

Appellant applied to the California Supreme Court for a writ of habeas corpus, which was denied on February 9, 1966 (TR 6-7).

B. Proceedings in the federal courts.

On March 1, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (TR 2). In his petition he alleged that he was interrogated by police officers without being advised of his right to counsel or his right to remain silent, and that the statements he made to the police officers induced his plea of guilty. On March 4, 1966, petitioner's motion to file in forma pauperis was denied solely on the basis that Escobedo v. Illinois, 378 U.S. 478 (1964) does not operate retroactively to affect convictions final before that decision (TR 1).

On April 5, 1966, the court granted petitioner's motion for a certificate of probable cause and allowed petitioner to file notice of appeal in forma pauperis (TR 35). Notice of appeal was filed on April 15, 1966 (TR 36).

1. "TR" refers to the Transcript of Record on this appeal.



SUMMARY OF APPELLEE'S ARGUMENT

The Escobedo rule does not apply retroactively.

ARGUMENT

In both his petition to the District Court for a writ of habeas corpus, and his brief to this Court seeking reversal of the order denying the writ, appellant bases his attack upon his state conviction on a retroactive application of Escobedo v. Illinois, supra. He contends that the charges to which he pled guilty were supported in part by statements elicited from him in violation of the Escobedo rule.

This case is governed by Johnson v. New Jersey 34 U.S.L.Week 4592 (June 20, 1966), in which the Supreme Court of the United States has definitely declared that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. As noted above, the proceedings which culminated in the judgment that petitioner now seeks to collaterally attack began and were concluded in 1962, long before the date of the Escobedo decision. Consequently, appellant's petition to the district court did not state grounds for relief and was properly denied.

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

1625-1649

By JOHN RICHARDSON, Esq. of the Middle Temple.
In two Volumes. The first Volume contains the History of the
Reign of King Charles the First, from the year 1625 to the year
1649. The second Volume contains the History of the
Reign of King Charles the Second, from the year 1660 to the year
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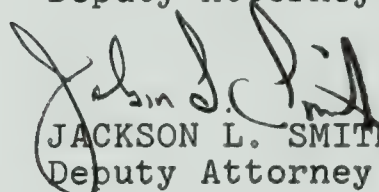
CONCLUSION

We respectfully submit that the order of the District Court should be affirmed.

Dated: July 11, 1966.

THOMAS C. LYNCH,
Attorney General of California

ROBERT R. GRANUCCI,
Deputy Attorney General


JACKSON L. SMITH,
Deputy Attorney General

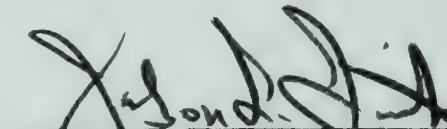
Attorneys for Appellee

rcg
CR SF
66-837

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: July 11, 1966.



JACKSON L. SMITH,
Deputy Attorney General



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W.D. NOLEN,

Petitioner-Appellant,

vs.

LAWRENCE E. WILSON,

Respondent-Appellee.

NO. 20984 ✓

APPELLEE'S BRIEF

Appeal from the United States
District Court for the Northern
District of California
Southern Division

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

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FILED

AUG 15 1966

WM. B. LUCK, CLERK

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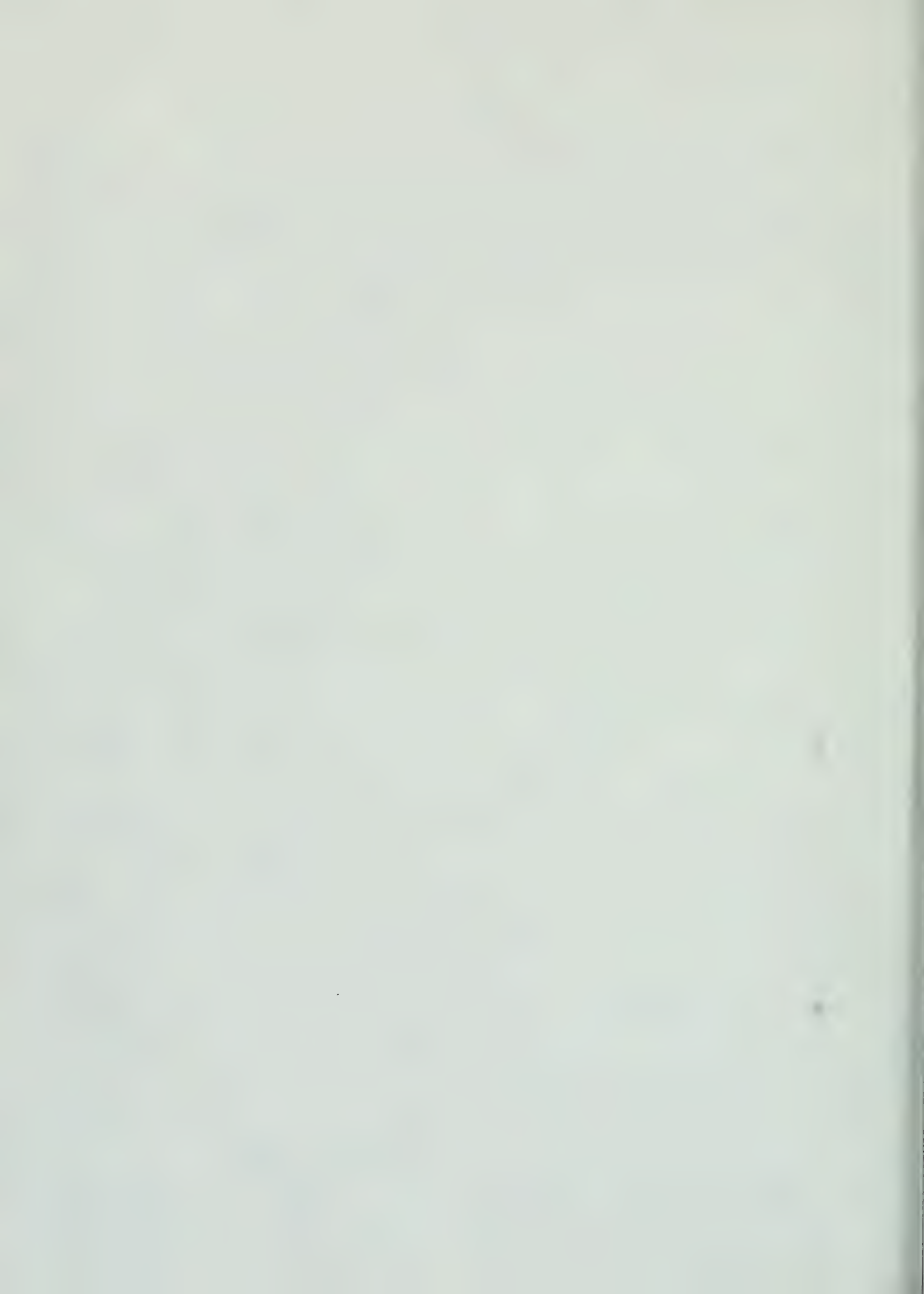


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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W.D. NOLEN,)	
)	
Petitioner-Appellant,)	
)	
vs.)	NO. 20984
)	
LAWRENCE E. WILSON,)	
)	
Respondent-Appellee.)	
)	
)	

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, Southern Division, denying his application for a writ of habeas corpus.

A. Proceedings in the State Courts

On February 14, 1963, appellant upon his plea of not guilty, in the Superior Court of Alameda County, while represented by Roy Hamrick, Esq., was convicted of the felony offense of first degree robbery, a violation of California Penal Code section 211 (CT 2, 8). On March 21, 1963, appellant's motion for probation and his motion for a new trial were denied. And on the same day, appellant was sentenced to the state prison for the term prescribed by law.

Appellant appealed the above conviction and said conviction was affirmed by the District Court of Appeal of the State of California, First Appellate District, Crim. No. 4385. Appellant then petitioned for hearing in California Supreme Court and said petition was denied (CT 3). Substantially the same legal issues now presented to this Court were raised in those proceedings.

B. Proceedings in the Federal Courts

On March 15, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1). The Honorable Albert C. Wollenberg denied the application on March 24, 1966 (CT 11). The basis of the Court's order was that upon examining the trial transcript, the Court could not conclude the petitioner was denied a fair trial, even assuming



that certain errors were committed by counsel (CT 12). Moreover, the issue of sufficiency of the evidence did not present a federal question (CT 12).

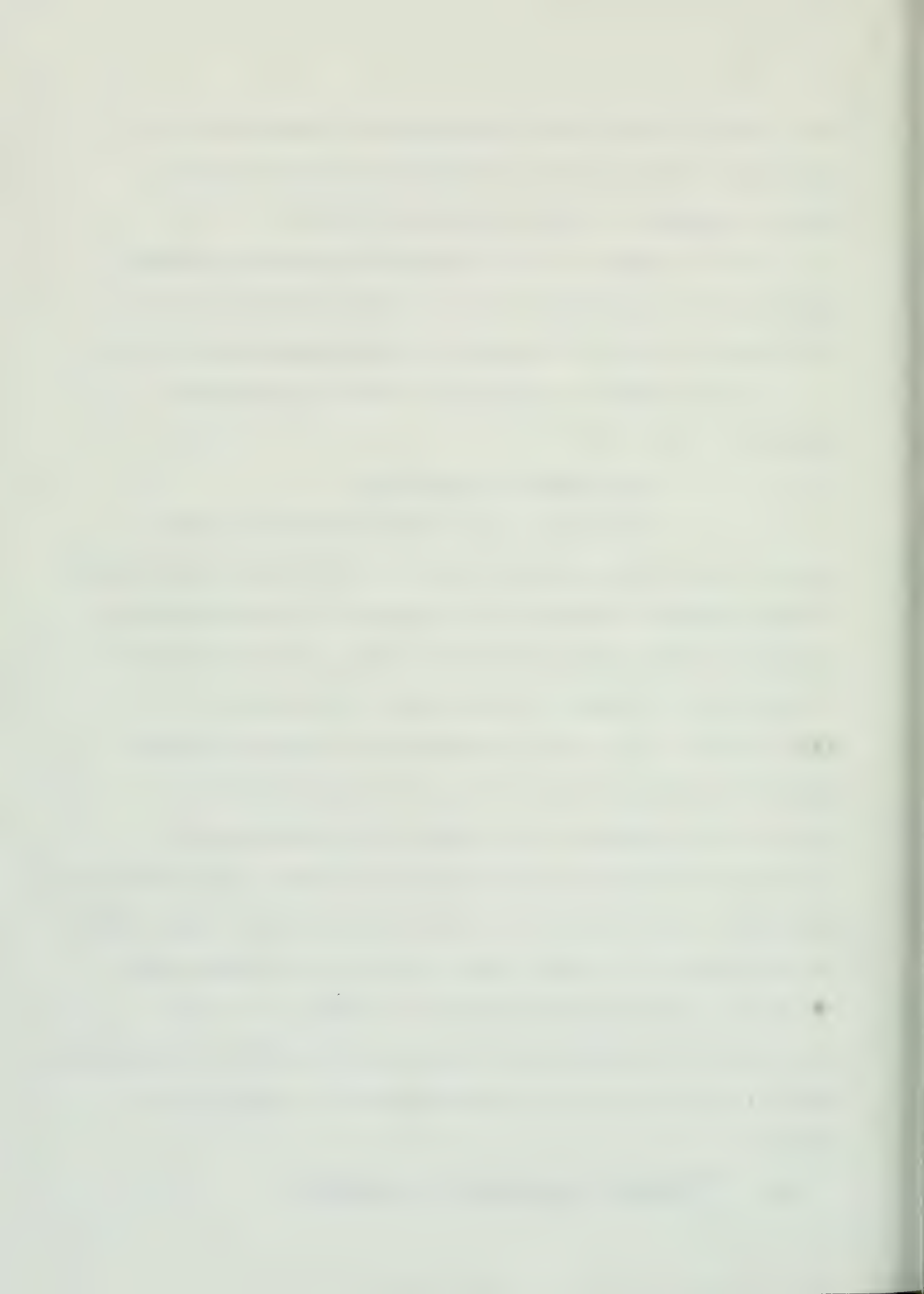
On April 19, 1966, Judge Wollenberg granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis (CT 13).

A notice of appeal was filed by appellant on April 4, 1966 (CT 14).

APPELLANT'S CONTENTIONS

On this appeal appellant contends (1) that he was denied due process because of deliberate misconduct by the district attorney, (2) motion to exclude certain evidence constituted prejudicial error, (3) the failure of the court to grant a motion for a mistrial or to admonish the jury as the handling of a certain exhibit constituted prejudicial error, (4) comments of the trial court regarding the effect of an admission by a codefendant constituted prejudicial error, (5) questions directed to the appellant on cross-examination regarding his possession of a gun found in the glove compartment of the car constituted prejudicial error, (6) the testimony of an accomplice was not sufficiently corroborated, and (7) the evidence was insufficient to support the verdict.

SUMMARY OF APPELLEE'S ARGUMENT



I. Appellant has not shown he was deprived of his constitutional right to a fair trial.

II. The allegations that the evidence was insufficient do not raise a federal question.

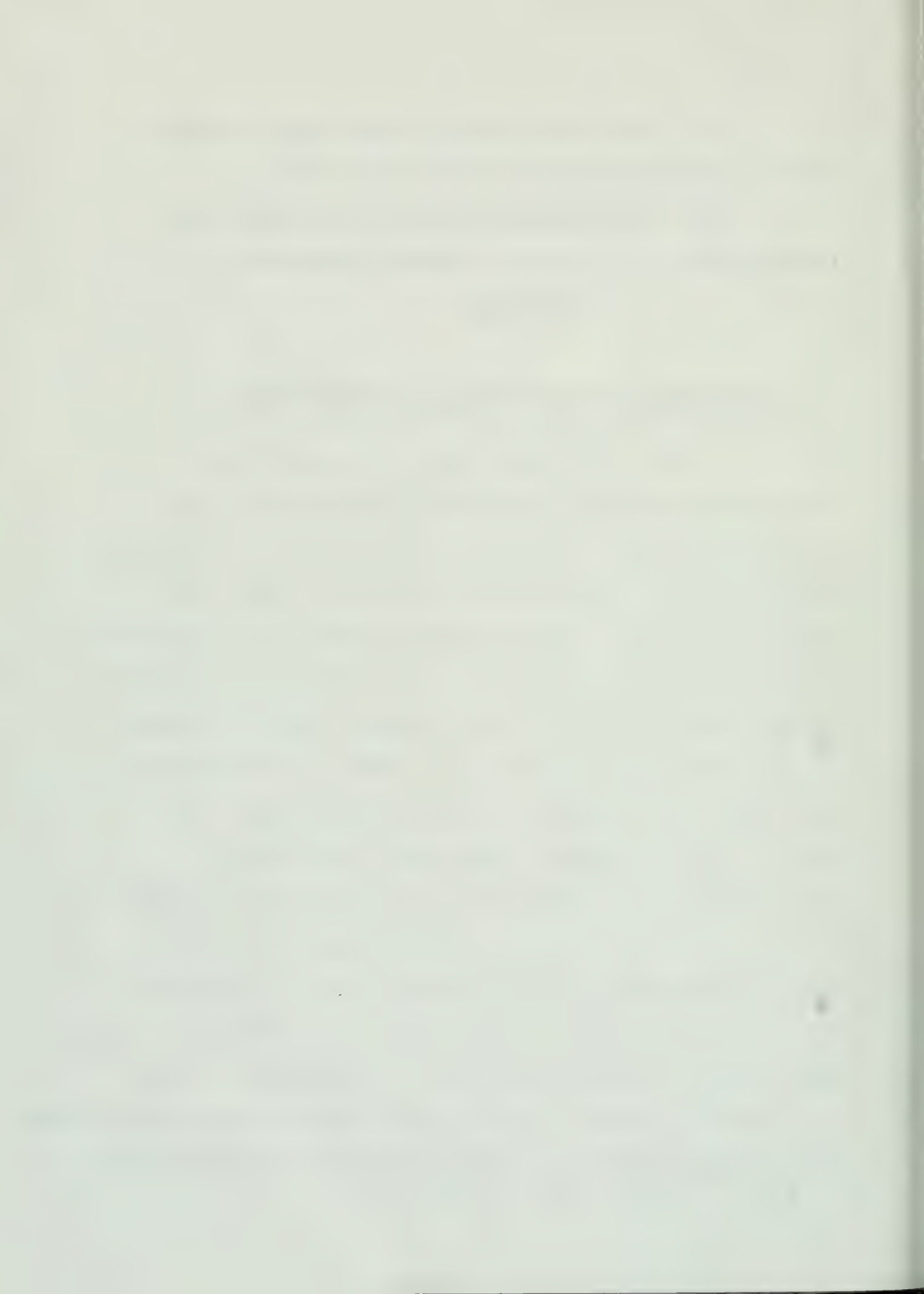
ARGUMENT

I

APPELLANT HAS NOT SHOWN HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant asserts that (1) he was denied due process because of deliberate misconduct by the district attorney, (2) the denial of a motion to exclude certain evidence constituted prejudicial error, (3) the failure of the court to grant a motion for a mistrial or to admonish the jury as to the handling of a certain exhibit constituted prejudicial error, and (4) comments of the trial court regarding the effect of an admission by a codefendant constituted prejudicial error. In making these allegations, appellant has failed to demonstrate he was deprived of a constitutional right.

The function of a federal court "in this type of proceeding is not to correct errors committed in a state trial court. [citation] 'The state has full control over the procedures in its courts, both in civil and criminal cases; subject only to the qualifications that such procedure must not work a denial of fundamental



rights, or conflict with specific and applicable provisions of the Federal Constitution.'" Sampsell v. People of State of California, 191 F.2d 721, 725 (9th Cir. 1951). Here, appellant has failed to demonstrate that he was in any way denied his constitutional right to a fair trial.

Appellant first contends that he was prejudiced by questions asked by the prosecutor in cross-examination concerning a gun found in the automobile appellant had in his possession at the time of his arrest. In essence, appellant argues that the gun referred to was not the gun admitted into evidence as the one used by appellant in the perpetration of the robbery, and that the complained of questions could only have served to show appellant is the type of person who had deadly weapons in his possession, to his prejudice.

The prosecutor began his cross-examination of appellant by questioning him concerning the automobile found in his possession at the time of his arrest, and a purse which was found therein (RT 187-188).^{1/} He then asked: "Now can you tell me how the gun got into the purse?" (RT 188: 19). Appellant objected

^{1/} "RT" designates the Reporter's Transcript on the State appeal.



to the question; it was not answered, and the court granted appellant's motion to strike the "testimony" with reference to the gun (RT 188-89). Thereafter, appellant testified that he placed the gun in the purse, and when asked what he had put in the purse, he answered, "A gun" (RT 189: 15-26). During this entire testimony, no objection was made by appellant.

Under California law, appellant must show that when the complained of questions were asked at the trial, he objected and specifically stated the proper grounds for objection to the particular evidence he sought to exclude. Failure to show this amounts to waiver. See, e.g., People v. Ferlin, 203 Cal. 587, 600 (1928); People v. Dement, 48 Cal.2d 600, 604 (1957).

Appellant's failure to object at all during this now complained of line of questioning clearly amounted to an affirmative waiver.

Appellant next contends that the failure of the court to grant appellant's motion to remove from evidence a gun which a codefendant testified that appellant used in the robbery on the grounds that it was not sufficiently identified as the gun used, was a denial of due process.

During the trial, the prosecution produced

a gun which was positively identified by Robert Dorsey (a codefendant) as the gun used by appellant during the robbery. Dorsey stated that he had placed the gun in the front seat of a 1950 Ford automobile, and that appellant had obtained it therefrom prior to entering the West Coast Food Market (RT 101: 22-26; 102: 1-6). The gun was received in evidence without any objection being made by appellant. On cross-examination, Dorsey testified that he had brought two guns with him to the automobile on the evening of October 27, 1962; that one was a .32 automatic, which he kept, and the other, a ".45" which he described as a "Hawkins" revolver. He claimed that appellant had the latter gun in his possession when they left the automobile to enter and rob the West Coast Food Market (RT 1113, 116, 117). The gun admitted in evidence was subsequently identified as a .357 caliber "Blackhawk" made by Sturm, Ruger Company (RT 147).

Thereafter, after resting his case, appellant moved to strike the gun from evidence on the grounds that it had not been identified. The trial court denied this motion (RT 198-99). Appellant now argues that the trial court's action constituted a denial of due process.

Five eyewitnesses to the robbery testified

that the robber who took the money and hit the clerk over the head, carried a gun (RT 8, 37, 46, 67, 101). Appellant was positively identified as that robber (RT 12-13, 26, 41-42, 57, 90, 91-92, 94, 101).

When shown People's Exhibit #1, Dorsey identified it as the gun which appellant used in the perpetration of the robbery. The fact that Dorsey's description of the gun as a ".45" and "Hawkins" revolver was contradicted by a policeman's testimony that after examining the gun he found it to be a .357 Sturm, Ruger "Blackhawk," does not destroy Dorsey's visual identification of the gun in evidence as the one used by appellant. The gun was positively identified, and it alone was the best evidence of what type, caliber, and make it was. The action of the trial court, here, clearly did not constitute a denial of due process of law.

Thirdly, appellant Nolen contends that the denial of appellant's motion for a mistrial and the court's refusal to admonish the jury following the unloading of a gun in the presence of the jury constituted a denial of due process.

Although the exact circumstances are not contained in the record, it appears from a colloquy between the prosecutor, trial court and defense counsel, held in chambers after appellant's counsel had rested

his case, that during the first day of trial the gun which was later admitted into evidence as People's Exhibit #1, was brought to the courtroom where it was found to contain cartridges and was unloaded by the bailiff at his desk. At the time of the incident, appellant made no objection. Instead, appellant waited until he had concluded his case for the defense, and then moved for a mistrial on the grounds that the incident constituted prejudicial misconduct on the part of the district attorney (RT 199). The court denied the motion but stated that it would admonish the jury relative to the incident (RT 199, 200).

During the discussion in chambers, the prosecutor explained that the gun had been loaded when obtained by the police department; that the cartridges removed were apparently empty or dummy shells; and that the incident was due to inadvertence (RT 199-200). The court then advised appellant that it would admonish the jury relative to the incident only if appellant was willing to have testimony adduced as to the condition of the gun when it was obtained by the police (RT 202-203). Appellant was unwilling to allow such testimony, and his motion for an admonition to the jury was thus denied (RT 204). Appellant now argues, on the basis of the above recited proceedings, that the action

of the court constituted the denial of due process.

Appellant further singles out certain comments made by the court during a discussion with the prosecutor and appellant's counsel.

Earlier in the trial, a statement taken from appellant's codefendant, Louis Bershell, was admitted into evidence (RT 143-45). At that time, the trial court properly admonished the jury that the statement was "binding only upon the defendant Bershell and not on the defendant Nolen." (RT 141: 10-11).

The trial court gave this admonition after the following colloquy:

"MR. HAMRICK [Appellant's counsel]: Now, your Honor, may we have an instruction at this time by the Court to the jury that this statement or admission or concession, or whatever it is, relates only to the defendant Bershell; that it is not and cannot be considered in any extent as far as the defendant Nolen is concerned?

"MR. MEAD [Prosecutor]: People so agree, Your Honor.

"MR. HAMRICK: It is hearsay as far as he is concerned and as such, is not to be treated as any evidence against him or for him, shall we say."

(RT 140, 141).

Appellant does not attack the admission of Bershell's statement. Nor does he claim the admonition then given to the jury that they consider that statement only against Bershell was ineffective. What appellant does contend, however, is that certain later comments made by the trial court gave credence to segments of the statement implicating Nolen, and recalled to the minds of the jurors the statement of Bershell implicating Nolen, thus acting to supersede by approval the admonition given earlier with respect to the statement. The record, however, demonstrates appellant's arguments to be but hopeful speculation.

The events of which appellant complains arose during the prosecutor's impeachment of Bershell's testimony. The prosecutor proceeded to do this by questioning appellant as to whether he had given the answers to Inspector Smith which were contained in the statement in evidence. Bershell maintained that appellant was not involved in the robbery (RT 225), and thus denied making any statement to Inspector Smith implicating appellant (RT 232).

After the prosecutor had pursued this line of questioning for some time, appellant requested an admonition, whereupon the following transpired:

"MR. HAMRICK: Going to ask that the Court the jury that - I assume that this is for impeachment purposes only of Mr. Bershell, is that correct, Counsel?

"MR. MEAD: Yes.

"MR. HAMRICK: I would again ask that admonition be made that this is for that purpose only, and if not - does not affect the defendant Nolen at this time, if the Court please.

"THE COURT: I don't know that I can so limit it. There's certain admissions made that the jury will draw any inferences and conclusions that they feel warranted.

"MR. HAMRICK: Well, I would assume that this is for purposes of impeachment, is that correct?

"MR. MEAD: Yes, at this time the statement is being used for purposes of impeachment of the witness, Your Honor. This is not to say that the statement insofar as it came from the mouth of the detective is not to be taken as substantive evidence insofar as Mr. Bershell is concerned.

"THE COURT: That's right, or Nolen.

"MR. MEAD: Well, the statement is not directed against Mr. Nolen, Your Honor, being a statement of the witness Bershell.

"THE COURT: All right.

"MR. HAMRICK: May I have my request for the admonition, Your Honor, that any statement or purported statement that refers to Mr. Nolen by Mr. Bershell is no evidence at this time against Mr. Nolen?

"THE COURT: This, ladies and gentlemen of the jury, is purely for impeachment purposes of Mr. Bershell." (RT 233, 234).

Appellant, apparently, contends that comments of the court during the colloquy between it, the prosecutor, and counsel for appellant were so prejudicial as not to be susceptible of correction by the admonition given.

It is the California rule that even though a comment standing alone might be legally objectionable, such comment must be considered in the context of circumstances. See People v. Juehling, 10 Cal.App.2d 527, 533 (1935). Observance of this rule destroys appellant's contention.

It should be noted, that throughout the exchange, the jury was aware that counsel for appellant and the prosecutor were in agreement that the questioning of Bershell by the prosecutor was to be considered for impeachment purposes only, and any use of the statement which the jury had been already admonished to consider only as against Bershell, would be again

considered only against Bershell.

The first statement made by the court, indicated an unsureness as to the effect to be given the prosecutor's question, but no specific reference was made to the statement which had been read into evidence earlier and limited to Bershell. Although the court's next fragmentary comments might be construed to indicate that the statement was admissible also against appellant, the court had previously admonished the jury to the contrary, and immediately recognized this in response to the prosecutor's declaration that the statement was so limited.

The admonition given, coming as it did after extensive comments by both counsel as to the limited effect of the use of the statement, clearly precluded any prejudice to appellant by reason of the jury's consideration of Bershell's statement against him. The jury was properly admonished, and it must be presumed that they deliberated accordingly.

Under California law the comments of the trial court may constitute reversible error only when it is apparent that those remarks deprive the appellant of a fair and impartial trial. See People v. Kendrick, 56 Cal.2d 71, 92 (1961); People v. Browning, 132 Cal.App. 136, 153 (1933). Here, none of the remarks were so

prejudicial.

It is, therefore, apparent that the above allegations of appellant involve questions of state procedure and do not present federal questions. The decision of the California District Court of Appeal clearly demonstrates that appellant was neither denied the right to a fair trial nor did the procedures followed during the trial indicate any constitutional infirmities. Moreover, even if such allegations do present a federal question, petitioner has wholly failed to demonstrate how he was thereby deprived of a constitutional right. Sampsell v. People of State of California, 191 F.2d 721 (9th Cir. 1951).

II

THE ALLEGATIONS THAT THE EVIDENCE WAS
INSUFFICIENT DO NOT RAISE A FEDERAL QUESTION.

Appellant here argues that the evidence was insufficient to support the verdict. Insufficiency of the evidence to support a conviction in the state court is not a basis for a habeas corpus in federal court. In re Dotson v. United States, 314 F.2d 50 (10th Cir. 1963); Miller v. Oberhauser, 293 F.2d 29 (9th Cir. 1961); Wampler v. Warden, Maryland Penitentiary, 224 F.Supp. 37 (1963).

Moreover, appellant is not entitled to federal

habeas corpus relief on the allegation that there was lack of corroboration of the testimony of an accomplice. Wampler v. Warden, Maryland Penitentiary, supra.

Here the record clearly indicates substantial, if not overwhelming, evidentiary basis for conviction. Thus, there is a difference between a conviction based on evidence deemed insufficient as a matter of state criminal law and one totally devoid of evidentiary support as to raise a due process issue, and it is only the latter situation that affords appellant a remedy in a federal court on a writ of habeas corpus. Faust v. State of North Carolina, 307 F.2d 869 (4th Cir. 1962); cert. denied 371 U.S. 964.

Thus, appellant's final two allegations regarding the insufficiency of the evidence fail to raise a federal question and therefore do not afford grounds for relief on habeas corpus in this court.

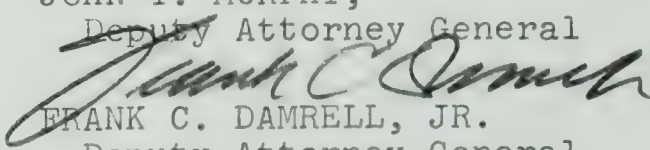
CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: August 15, 1966.

THOMAS C. LYNCH, Attorney General
of California

JOHN T. MURPHY,
Deputy Attorney General


FRANK C. DAMRELL, JR.
Deputy Attorney General

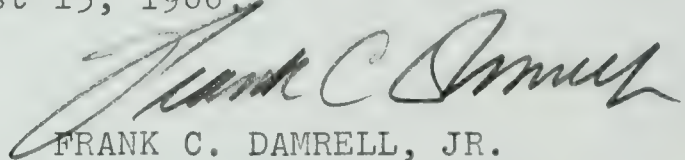
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

August 15, 1966.

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", is written over the typed name.

FRANK C. DAMRELL, JR.
Deputy Attorney General
of the State of California



